Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbents' network elements. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The questions presented in this case are:

1. Whether a state commission's action relating to the interpretation or enforcement of an interconnection agreement entered into pursuant to 47 U.S.C. 252 (Supp. IV 1998) is a "determination under [Section 252]" and therefore is reviewable in federal court under 47 U.S.C. 252(e)(6) (Supp. IV 1998).

2. Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act.

3. Whether a state commission waives its Eleventh Amendment immunity by accepting Congress's invitation to implement a federal regulatory scheme that provides for review of state commission determinations in federal court.

4. Whether the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permits an action against the members of a state commission in their official capacities to enjoin ongoing violations of federal law in performing regulatory functions under the 1996 Act.

PARTIES TO THE PROCEEDINGS

The United States of America was an intervenor and appellant in the courts below and is a petitioner in this Court. Verizon Maryland Inc. (formerly Bell Atlantic) was an appellant in the court of appeals. The appellees in the court of appeals were the Public Service Commission of Maryland, together with its members Glenn F. Ivey, Claude M. Ligon, E. Mason Hendrickson, Susan Brogan, and Catherine I. Riley; American Communications Services of Maryland, Inc.; RCN Telecom Services of Maryland, Inc.; Starpower Communications, LLC; TCG-Maryland; MCImetro Access Transmission Services, Inc.; Maryland Office of People's Counsel; and MCI WorldCom, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (reproduced in the Appendix to Verizon Maryland's petition for a writ of certiorari in No. 00-1531 [hereinafter Verizon App.] at 1a-72a) is reported at 240 F.3d 279. The opinion of the district court (Verizon App. 73a-90a) is unreported. The order of the Maryland Public Service Commission (Verizon App. 91a-111a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant portions of the Telecommunications Act of 1996, the Federal Communications Commission's implementing regulations, and 28 U.S.C. 1331 are set forth at Verizon App. 112a-134a.

STATEMENT

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case concerns the provisions of the 1996 Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1 *et seq.*, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to

provide monopoly local exchange service in their respective regions. What remained of AT&T continued to provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 1st Sess. 48-50 (1995).

a. In considering how to encourage competition in local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable, even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor fully to duplicate an incumbent carrier's local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Accordingly, Congress, in Section 251 of the 1996 Act, 47 U.S.C. 251,[1] provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2). Second, new entrants are entitled to gain access to elements of an

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[1] All citations of the 1996 Act are of Supp. IV 1998.

incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4). Incumbents are also required to provide physical access to their poles, ducts, conduits, and rights-of-way, in order to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The 1996 Act requires an incumbent to negotiate in good faith with a new entrant that requests interconnection, access to network elements, resale of services, and other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration in the event that the parties cannot conclude such "interconnection agreements" through negotiation. 47 U.S.C. 252(b).

b. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, to set the terms and conditions for those agreements (subject to the standards set forth in the Act and the regulations promulgated by the Federal Communications Commission (FCC) pursuant to the Act), and to exercise review and enforcement authority. If the state commission elects not to assume regulatory authority, the FCC will perform that role. 47 U.S.C. 252(e)(5).

Under the 1996 Act, the extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbi-

trated. A negotiated agreement is subject to review by the state commission (or, if the state commission chooses not to regulate, by the FCC) to determine whether the agreement discriminates against non-party carriers and is consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state public utility commission (or, if the state commission chooses not to regulate, the FCC) will resolve any open issue, including the rates, terms, and conditions under which competitors will enter the local market, as well as prices that the incumbent and the new entrant will pay one another for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations. 47 U.S.C. 252(c). An arbitrated agreement is subject to review by the state commission to determine whether the agreement complies with Sections 251 and 252 of the 1996 Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not act to approve or reject an agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The 1996 Act provides that any party "aggrieved" by a determination of a state public utility commission may file suit in federal district court for a determination "whether the agreement * * * meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the State has assumed the regulatory role, the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* (1994 & Supp. V 1999), authorizes federal appellate court review of the FCC's orders.

2. The Public Service Commission of Maryland (MPSC) has voluntarily exercised regulatory authority under the 1996 Act. The MPSC approved interconnection agreements between Bell Atlantic, the incumbent service provider in Maryland (and a predecessor to Verizon Communications, Inc.), and prospective entrants to the local telephone markets, including MCI WorldCom. As required under the 1996 Act, those agreements provided for the payment of reciprocal compensation (*i.e.*, payments by the carrier of the party originating a local call to the carrier of the party receiving the call) for "local" calls. See 47 U.S.C. 251(b)(5). When a dispute subsequently arose concerning Bell Atlantic's obligation to pay reciprocal compensation for calls bound for internet service providers, the MPSC again exercised regulatory authority under the 1996 Act, issuing a determination that such calls are "local" and ordering the payment of reciprocal compensation.

3. Invoking 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331, Bell Atlantic sought review of the MPSC's reciprocal compensation order in federal district court, arguing that the order was contrary to federal law. Bell Atlantic named as defendants the MPSC, its individual commissioners in their official capacities, and the affected carriers.

The MPSC and its commissioners moved to dismiss. They argued that the district courts lack subject-matter jurisdiction to review decisions of a state public utility commission enforcing (as opposed to approving or rejecting) a previously approved interconnection agreement. They also argued that state commissions and their commissioners are immune from such actions under the Eleventh Amendment. The United States

intervened to defend the constitutionality of the judicial review provisions of the 1996 Act.

The district court dismissed the action. The court concluded that the Eleventh Amendment barred suit against the MPSC and its individual members. Verizon App. 77a-84a. The court rejected the argument that the MPSC had waived its sovereign immunity by voluntarily electing to exercise regulatory authority under the 1996 Act. *Id.* at 77a-79a. The court also rejected the argument that the action could proceed against the individual commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which authorizes actions against state officers in their official capacities to enjoin violations of federal law. Verizon App. 79a-83a. The court then concluded that the MPSC was an indispensable party to the action under Rule 19 of the Federal Rules of Civil Procedure, and thus that the action had to be dismissed against the other defendants as well. Verizon App. 84a-86a.

4. A divided panel of the Fourth Circuit affirmed. The panel held that state public utility commissions and their commissioners are immune from suit in federal court under the Eleventh Amendment. The panel also held that the district courts lack subject-matter jurisdiction to review state commission decisions enforcing or interpreting previously approved interconnection agreements. Verizon App. 1a-51a.

First, the panel held that the MPSC had not waived its sovereign immunity by electing to exercise regulatory authority over interconnection agreements entered into pursuant to the 1996 Act. Verizon App. 14a-21a. The panel accepted that "a State commission that elects to make § 252 determinations must, of necessity, also be electing to have its determinations reviewed by a federal court under § 252(e)(6)." *Id.* at

14a-15a. But the panel declined to "infer from this consent to federal-court review a consent by a State commission itself *to be made a party* to that federal review." *Id.* at 15a. The panel noted that no provision of the Act expressly states that a state commission, by electing to regulate under the 1996 Act, "thereby agrees to be named as a party in federal court or * * * waives its Eleventh Amendment immunity." *Ibid.* The panel concluded that, absent such an "unmistakably clear and unequivocal" expression of Congress's intent "to condition State utility commissions' participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit," no such waiver could properly be inferred. *Id.* at 18a-19a.

Second, the panel held that the individual commissioners are not amenable to suit under *Ex parte Young*. Verizon App. 21a-30a. The panel focused its analysis on "the federal interests served by permitting [such] a federal suit." *Id.* at 24a. The panel reasoned that "[t]he federal interest furthered by the 1996 Act is to have § 252 determinations made by State commissions reviewed in federal court," *not* "to discipline individual State officials or to expose them to any liability." *Ibid.* The panel concluded that "this interest would not be frustrated if we were to preserve the Eleventh Amendment immunity of State officials with respect to such suits." *Id.* at 25a.

In addition, the panel expressed doubt that "Bell Atlantic's action is designed to prevent an ongoing violation of federal law," noting that federal law does not clearly prohibit the treatment of ISP-bound calls as "local" traffic. Verizon App. 25a-27a. The panel suggested that, "in any suit against State commissioners, it is more likely that State-contract-law, rather

than federal-law, violations would be redressed." *Id.* at 29a.

The panel also suggested that allowing *Ex parte Young* actions to challenge the decisions of state commissions "would improperly expand the federal remedy selected by Congress." Verizon App. 29a. The panel construed the 1996 Act as reflecting Congress's determination to limit federal court review to only those decisions of state commissions that involve the initial approval or rejection of interconnection agreements. *Id.* at 28a-29a.

Third, the panel held that federal district courts do not have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements, as distinguished from decisions approving or rejecting interconnection agreements in the first instance. Verizon App. 30a-47a. The panel noted that Section 252(e)(6) provides, by its terms, for review of state commission "determination[s] under this section [*i.e.*, Section 252]" to ascertain whether those determinations "meet[] the requirements of section 251 and this section [*i.e.*, Section 252]." *Id.* at 38a-39a. The panel reasoned that "in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements." *Id.* at 39a. The panel concluded that other state commission determinations, including those enforcing interconnection agreements, are "left for review as specified by State law." *Ibid.*

Here, the panel noted that the MPSC had approved the interconnection agreements between Bell Atlantic and MCI Worldcom and that "no party challenged that approval" in the district court. Verizon App. 40a. The panel concluded that the MPSC's decision enforcing that previously approved agreement "was not a § 252

determination and therefore was not reviewable in federal court by virtue of § 252(e)(6)." *Id.* at 43a.

Finally, the panel held that 28 U.S.C. 1331 likewise does not provide a basis for federal court jurisdiction to review state commission decisions enforcing interconnection agreements. Verizon App. 47a-50a. The panel reasoned that Congress intended to limit federal court review with respect to the Section 252 process to the circumstances specified in Section 252(e)(6). "[I]n light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6)," the court observed, "the exercise of § 1331 general federal-question jurisdiction would 'flout, or at least undermine, congressional intent.'" *Id.* at 48a (quoting *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 812 (1986)).

5. Judge King dissented from the panel's holdings on both the jurisdictional issue and the Eleventh Amendment issue, which he noted were in conflict with holdings of the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Verizon App. 52a-53a (citing cases). On the jurisdictional issue, Judge King concluded that federal district courts have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements. Verizon App. 54a-58a. He reasoned that "the power granted to states under § 252 to approve or reject interconnection agreements * * * necessarily includes the power to enforce the interconnection agreement." *Id.* at 55a (internal quotation marks omitted). He therefore concluded that a state commission decision enforcing an interconnection agreement is a "determination under [Section 252]" within the meaning of the grant of federal court jurisdiction in Section 252(e)(6). *Ibid.*

On the Eleventh Amendment issue, Judge King concluded that the MPSC waived its sovereign immunity

by electing to exercise regulatory authority under the 1996 Act. Verizon App. 59a-67a He disagreed with the panel majority's determination that Congress had not invited the States to waive their sovereign immunity with sufficient clarity. He viewed the judicial review provisions of the Act as "clearly show[ing] Congress's intent to subject participating states to suit in federal court." *Id.* at 60a-61a.

In the alternative, Judge King concluded that the individual MPSC commissioners are amenable to suit under *Ex parte Young*. Verizon App. 67a-71a. He reasoned that the 1996 Act does not create an elaborate remedial scheme that would be improperly "expand-[ed]" by allowing such review, *id.* at 69a-70a, and that Maryland has no "special sovereignty interest" in the regulation of aspects of local telecommunications now governed by the Act, *id.* at 71a.

DISCUSSION

1. On March 5, 2001, this Court granted the petition for a writ of certiorari in *Mathias* v. *WorldCom Technologies, Inc.* (No. 00-878). See 121 S. Ct. 1224. The questions presented in *Mathias*, which arises from a decision of the Seventh Circuit, are essentially identical to the questions presented in this case: whether federal district courts have subject-matter jurisdiction over actions to review state public utility commission decisions enforcing interconnection agreements entered into pursuant to the 1996 Act, and whether state commissions or their commissioners may be made defendants in such actions consistent with the Eleventh Amendment.

The United States has intervened in a number of cases, including the present case, in order to address

those issues.[2] The United States has taken the position that the district courts possess jurisdiction, under 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331, over actions seeking review of state commission decisions enforcing previously approved interconnection agreements. In addition, the United States has taken the position that the Eleventh Amendment does not preclude such actions against state commissions or individual state commissioners in their official capacities. The United States has argued that state commissions waived their sovereign immunity by electing to exercise regulatory authority under the 1996 Act; alternatively, the United States has argued that state commissioners are amenable to such suits under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

The Court's decision in *Mathias* will very likely affect the proper disposition of this case. The petition for a writ of certiorari should, therefore, be held pending this Court's decision in *Mathias* and then disposed of as appropriate in light of that decision.

2. We note, however, that there are two considerations that might warrant also granting plenary review in this case.

First, Verizon, in its own petition for certiorari, urges that this case affords the Court an opportunity to

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[2] See, *e.g.*, *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d 636 (5th Cir. 2001); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942 (8th Cir. 2000); *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001); *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001); *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000). The United States did not intervene, however, in the lower court proceedings in *Mathias*.

consider whether 28 U.S.C. 1331 provides an alternative basis for federal court jurisdiction to review state commission determinations enforcing interconnection agreements. See Pet. at 3-4, 15-26, *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, No. 00-1531. As Verizon notes, the jurisdictional question on which the Court granted certiorari in *Mathias* refers only to 47 U.S.C. 252(e)(6), and the Seventh Circuit did not address the question of jurisdiction under 28 U.S.C. 1331 in that case. See Pet. App. at 24a, 29a n.3, *Mathias* v. *WorldCom Techs., Inc.*, No. 00-878.

In our view, however, this Court could consider in *Mathias* whether federal court jurisdiction to review such state commission determinations exists under 28 U.S.C. 1331, if this Court were to disagree with the Seventh Circuit's holding that jurisdiction exists under 47 U.S.C. 252(e)(6). The plaintiff in *Mathias* cited 28 U.S.C. 1331 as an alternative basis for jurisdiction. See Pet. at 7, *Mathias*, *supra*, No. 00-878. The district court, after determining that federal court jurisdiction existed under 47 U.S.C. 252(e)(6), noted that it therefore did not have to consider whether jurisdiction also existed under 28 U.S.C. 1331. See Pet. App. at 29a n.3, *Mathias*, *supra*, No. 00-878. The Seventh Circuit likewise had no reason to reach the issue of Section 1331 jurisdiction in light of its conclusion that jurisdiction existed under Section 252(e)(6). In opposing the petition for certiorari in *Mathias*, the respondents noted the availability of 28 U.S.C. 1331 as an alternative basis for jurisdiction. See Br. in Opp. of Worldcom Technologies, Inc., *et al.*, at 20, *Mathias*, *supra*, No. 00-878.

As Verizon's petition for certiorari notes (at 14), the telecommunications industry and federal and state regulators have a need for prompt and definitive

resolution of the question whether federal courts may review state commission decisions enforcing interconnection agreements. Accordingly, if the Court has substantial doubt about its ability in *Mathias* to consider Section 1331 as an alternative basis for jurisdiction, we suggest that the Court grant our petition and Verizon's petition in this case, rather than hold the petitions pending the disposition of *Mathias*, so that the jurisdictional question may be definitively resolved during the Court's October 2001 Term.

Second, some question may exist as to the standing of the Illinois Commerce Commission (ICC) and its commissioners in *Mathias* to seek review of the Seventh Circuit's Eleventh Amendment and jurisdictional holdings. The Seventh Circuit affirmed the ICC's underlying ruling that was challenged in *Mathias*. A decision by this Court in the ICC's favor on the Eleventh Amendment or jurisdictional issues would afford the ICC no greater relief with respect to that case. This Court may conclude, however, that the ICC and its commissioners have standing to raise those issues.[3] Again, if the Court has any substantial concern about the ICC's standing in *Mathias*, the Court may wish to grant plenary review in this case as well.

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[3] It would nonetheless appear that the ICC would be able to assert its Eleventh Amendment arguments on an interlocutory appeal in future litigation. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). And, because the issue of statutory jurisdiction is logically antecedent to that of Eleventh Amendment immunity, see *Vermont Agency of Natural Resources* v. *United States*, 529 U.S. 765, 779 (2000), an interlocutory appeal also could properly present the jurisdictional question.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, and disposed of as appropriate in light of the decision in that case. Alternatively, the petition should be granted and the case should be considered together with *Mathias*.

Respectfully submitted.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Verizon Maryland Inc. states the following:

Verizon Maryland Inc. (formerly Bell Atlantic-Maryland, Inc.) is a wholly owned subsidiary of Verizon Communications Inc., a publicly held company. No publicly held company owns 10% or more of the stock of Verizon Communications Inc.

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RESPONSE OF VERIZON MARYLAND INC.

While asking the Court to hold the government's petition pending the decision in *Mathias v. WorldCom Technologies, Inc.*, No. 00-878, the Solicitor General emphasizes "two considerations that might warrant also granting plenary review in this case." Pet. 12. Verizon Maryland Inc., which filed a companion petition for a writ of certiorari in No. 00-1531, submits this short response to the Solicitor General's petition to reinforce the desirability of a separate grant in this case.

The sharp circuit conflicts on all four questions presented by both petitions have created uncertainty about the proper means for seeking judicial review of state commission orders. That uncertainty, moreover, threatens to impede the uniform and coherent administration of the 1996 Act. It is therefore particularly important for the Court to resolve next Term the full

set of those jurisdictional and constitutional questions. As the Solicitor General aptly puts it, "the telecommunications industry and federal and state regulators have a need for prompt and definitive resolution of the question whether federal courts may review state commission decisions enforcing interconnection agreements." Pet. 13-14; *see also* No. 00-1531 Pet. 4, 14.

It was the Fourth Circuit's decision in the present case that opened these circuit splits and that presumably led this Court to grant review in *Mathias* very shortly thereafter. It now appears, however, that *Mathias* has two potential problems that may prevent the Court from using that case as the vehicle for reaching the issues it has agreed to review.

First, one of the threshold statutory questions — whether 28 U.S.C. § 1331 provides an independent source of federal court jurisdiction to review state commission decisions — is not presented by *Mathias*. If the Court were to hold in *Mathias* that 47 U.S.C. § 252(e)(6) does not apply, and if § 1331 is not properly before the Court in that case, it may not be able to reach the Eleventh Amendment questions until it grants review in a subsequent case. That might delay a definitive ruling until at least the following Term.

The Solicitor General believes that the Court could consider the § 1331 issue in *Mathias* as an alternative ground for affirming the Seventh Circuit's jurisdictional holding. *See* Pet. 13. But the Court specifically limited its grant of certiorari in that case to three restated questions (none of which subsumes § 1331), and the court below in *Mathias* gave no consideration to § 1331 in reaching its decision. In contrast, the § 1331 issue is squarely presented by both petitions in this case, and the Fourth Circuit expressly considered and ruled on the issue below. If this Court has any doubt about the appropriateness of considering § 1331

in *Mathias*, the preferable course is to grant review in this case as well.

Second, as the Solicitor General notes, the standing of the *Mathias* petitioners may be in doubt. *See* Pet. 14. Because the Illinois Commerce Commission and its commissioners (the petitioners in *Mathias*) prevailed on the merits in the Seventh Circuit, it is unclear what greater relief they could obtain from a decision in their favor on the issues that this Court agreed to review. The risk that the Court might for this reason ultimately dismiss the *Mathias* petition as improvidently granted makes it all the more appropriate to grant the petitions in Nos. 00-1531 and 00-1711 to ensure that the important issues at stake can be definitively resolved next Term.

Given these potential problems with *Mathias*, we urge the Court to grant these petitions and set the case for oral argument in tandem with *Mathias*.

Respectfully submitted,

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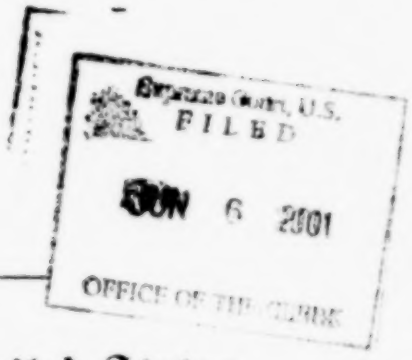

No. 00-1711

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. §252(e)(6) grants a federal district court jurisdiction to review decisions of a state commission enforcing or interpreting previously approved interconnection agreements.

2. Whether a federal district court has subject matter jurisdiction under 28 U.S.C. §1331 to review state commission orders rendered pursuant to the Telecommunications Act of 1996 where suit under 47 U.S.C. §22(e)(6) is barred pursuant to the Eleventh Amendment to the United States Constitution.

3. Whether a state commission waives its sovereign immunity by participating in the administration of the Telecommunications Act of 1996.

4. Whether the *Ex parte Young* doctrine authorizes suit against the individual state commissioners for actions taken pursuant to the Telecommunications Act of 1996.

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No. 00-1711

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

The Maryland Public Service Commission and the individual Commissioners acting in their official capacity (collectively "the Maryland Commission") respectfully respond to the petition for writ of certiorari filed by the United States of America ("United States") seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the Maryland Commission. The Maryland Commission is an agency of the State of Maryland and it supervises and regulates telecommunications carriers in Maryland. As part of its responsibilities, the Maryland Commission administers and enforces the *Public Utility Companies Article* of the Maryland Code. Final orders or decisions of the Maryland Commission are subject to judicial review in Maryland circuit courts, *Public Utility Companies Article* §3-204 of the Annotated Code of Maryland. Parties are entitled to further review by the Maryland Court of Special Appeals. *Id.* at §3-209.

This case began at the Maryland Commission when Verizon filed a request for declaratory ruling asking that the Maryland Commission find that Verizon was not obligated under §251 of the Telecommunications Act of 1996 ("1996 Act") to pay reciprocal compensation for calls delivered to Internet Service Providers ("ISPs") who are served by competitive local exchange carriers ("CLECs"). The Maryland Commission issued a declaratory ruling finding that Verizon must continue to pay reciprocal compensation and Verizon sought review of this order pursuant to §252(e)(6) of the 1996 Act and 28 U.S.C. §1331.

A. THE TELECOMMUNICATIONS ACT OF 1996

Congress enacted the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 et seq.) to open the local telecommunications markets to competition.[1] The 1996 Act[2] imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as Verizon, the duty to interconnect is even more specifically defined by §251(c)(2). In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, ILECs may negotiate and enter in

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[1] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau (Spring 1996) at page 3.

[2] *See*, 47 U.S.C. §§251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of §251.

The procedures for negotiations between CLECs and ILECs are governed by §252 of the 1996 Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier, or the implementation of such an agreement is not consistent with the public interest. 47 U.S.C. §252(e)(2)(A).

B. PROCEEDINGS BEFORE THE MARYLAND COMMISSION

Pursuant to the 1996 Act, MFS Intelenet of Maryland, Inc. ("MFS") and Verizon entered into an interconnection agreement on July 16, 1996. The Maryland Commission approved this agreement on October 9, 1996. On April 28, 1997, Verizon informed MFS that it would discontinue payment of reciprocal compensation for calls to ISPs, claiming that the Agreement's reciprocal compensation provisions did not apply to calls to ISPs. On May 21, 1997, MFS filed a complaint with the Maryland Commission alleging that the actions of Verizon violated the 1996 Act and the MFS Agreement. On September 11, 1997, the Maryland Commission found that Verizon must pay reciprocal compensation to MFS for calls to ISPs under the terms of the Agreement. The Maryland Commission's

decision was upheld by the Circuit Court for Montgomery County, Maryland.[3]

The Maryland Commission considered this issue a second time within the context of a Sprint Communications Company, L.P. ("Sprint") complaint. Sprint filed a Motion for Resolution of Disputed Issue, seeking a Commission ruling on how ISP-bound calls should be treated. The Maryland Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from Verizon.

On February 26, 1999, the Federal Communications Commission ("FCC") released an Order addressing the jurisdictional status of calls to ISPs.[4] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by State commissions."[5] In response to the FCC Order, Verizon asked the Maryland Commission to reconsider the previous decisions requiring reciprocal compensation for calls to ISPs.

On June 11, 1999, the Maryland Commission, resolved the issue raised by Verizon. The Order has two distinct parts. First, with regard to the MFS Agreement, the Commission found that, under contract principles and using the analysis sanctioned by the FCC, parties to the MFS Agreement are entitled to reciprocal compensation for ISP-

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[3] Civil Action No. 178260, Docket Entry #26, March 26, 1998.

[4] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96, 14 F.C.C.R. 3689 (February 26, 1999). ("*ISP Order*")

[5] *Id.*, at para. 1. See, also, para. 22.

bound calls until July 1, 1999. (Pet. App. 103a-104a) Second, the Maryland Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated reciprocal compensation rates contained in the effective Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic. (Pet. App. 106a-107a).

C. DISTRICT COURT DECISION

Verizon sought review of the Maryland Commission's Order in the United States District Court for the District of Maryland. First, Verizon objected to the Maryland Commission's determination that Verizon should continue to pay reciprocal compensation for ISP-bound calls pursuant to the terms of previously approved interconnection agreements. Verizon also objected to the Maryland Commission's determination that CLECs who do not have approved interconnection agreements shall receive the arbitrated reciprocal compensation rates contained in the effective SGAT as an interim compensation mechanism.

On October 20, 1999, the District Court dismissed Verizon's Complaint, holding that: (1) the Commission and the individual commissioners were immune from suit under the Eleventh Amendment;[6] (Pet. App. 77a-84a) (2) the Commission was an indispensable party under Federal Rule of Civil Procedure 19(b) so that the case could not proceed without the Commission; (Pet. App. 84a- 86a) (3) alternatively, Verizon's challenge to that portion of the

[6] Based on this holding, the District Court declined to address the Commission's argument that the Court lacked jurisdiction to review Commission decisions **enforcing** interconnection agreements (Pet. App. 76a n.3)

Commission's Order relating to the SGAT was not ripe for review. (Pet. App. 86a-90a) and (4) the Eleventh Amendment would bar suit brought pursuant to 28 USC §1331. (Pet. App. 90a)

D. THE FOURTH CIRCUIT DECISION

Verizon and the United States Government appealed the District Court's decision. On February 14, 2001, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit reached four major conclusions. First, and foremost, the Court of Appeals found that a federal proceeding brought pursuant to §252(e)(6) of the 1996 Act against the Maryland Commission is constitutionally barred. The Fourth Circuit expressly found that Congress did not clearly manifest an intent to condition a state commission's participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. (Pet. App. 19a)

Second, and equally important, the Fourth Circuit also found that an action brought in federal court against the individual commissioners was constitutionally barred. Among other reasons, the Court of Appeals found that a federal court action against the State commissioners would improperly expand the federal remedy selected by Congress. (Pet. App. 29a)

The third determination by the Fourth Circuit was that §252(e)(6) does not confer jurisdiction on the federal courts to review a State commission's enforcement determinations. The Fourth Circuit found that because federal courts are courts of limited jurisdiction, determinations by State commissions that are not expressly designated for review in federal court are left for review by State courts. (Pet. App. 35a) The Court of Appeals then

held that State commission orders administering and enforcing interconnection agreements are not §252 determinations (Pet. App. 47a) Thus, according to the Court, these orders are reviewable only by State courts. (*Id.)*

Finally, with regard to federal question jurisdiction, the Fourth Circuit held that 28 U.S.C. §1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. §252(e)(6). The Court of Appeals found that it "would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. §1331 override this effort." (Pet. App. 48a). According to the Fourth Circuit, "[t]he simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. §1331." (Pet. App. 49a) (citations omitted)

DISCUSSION

The petition for certiorari seeks review of the Fourth Circuit's decision holding that the Maryland Commission did not waive it's Eleventh Amendment immunity to federal district court review when it implemented the 1996 Act. The United States also seeks review of the Fourth Circuit's holding that the *Ex parte Young*[7] doctrine does not permit an action against the individual commissioners in their official capacity. Further, the United States seeks review of the Court of Appeals' finding that a State commission's action interpreting or enforcing an interconnection agreement under the 1996 Act was not a "determination" under 47 U.S.C.

[7] *Ex parte Young*, 204 U.S. 123 (1908).

§252 (e)(6). Finally, the United States seeks review of the Fourth Circuit's holding that 28 U.S.C. §1331 does not provide a federal district court with independent subject matter jurisdiction to review determination rendered by a State commission pursuant to the 1996 Act.

The United States notes that this Court granted the petition for certiorari in *Mathias v. Worldcom Technologies, Inc.* (No. 00-878). *See*, 121 SCF 1224. The United States contends that the questions presented in *Mathias* are essentially identical to the questions presented in this case. However the United States fails to alert the Court that the Fourth Circuit decision at issue is actually much broader than the Seventh Circuit decision appealed in *Mathias*. The Illinois Commerce Commission order at issue in *Mathias* was solely an enforcement decision, i.e., the Order interpreted and enforced a previously approved interconnection agreement. In contrast, the Maryland Commission Order which was the subject of Verizon's original complaint is an enforcement order **and** an arbitration order. The Maryland Commission interpreted previously approved interconnection agreements and provided for reciprocal compensation for those competitive carriers still in the arbitration process. Thus, the Fourth Circuit determined that the Maryland Commission has Eleventh Amendment immunity for **any** suit brought pursuant to 47 U.S.C. §252 (e)(6), not just suits objecting to the Maryland Commission's interpretation and enforcement of approved interconnection agreements.

The Fourth Circuit itself recognized that its holdings with regard to the constructive waiver of Eleventh Amendment immunity, the application of the *Ex parte Young* doctrine and the scope of §252 (e)(6) of the 1996 Act

conflict with decisions in other jurisdictions.[8] (Verizon App 20a, 30a and 44a-45a) As the Maryland Commission stated in its opposition to the Verizon petition, the Maryland Commission does not oppose certiorari on these questions. However, the Maryland Commission's decision not to oppose certiorari should not be viewed as signaling agreement with the substantial issues raised by the United States before the Fourth Circuit. On the merits, the Maryland Commission disagrees with the Untied States' presumed position and believes, as summarized in the Maryland Commission's Brief in Opposition to Verizon's petition,[9] that the Fourth Circuit's decision on these issues is correct.

The United States raises a fourth question which is not an issue in *Mathias*. The United States suggests that the Court should determine whether jurisdiction exists under 28 U.S.C.§1331, either in the context of the *Mathias* appeal or by granting the writ of certiorari requested in this appeal. However, the United States provides no legitimate justification for its argument that the Court should consider this issue. The United States claims no conflict with any other Circuit Court nor of any decisions of this Court. The United States' sole justification for advocating granting the Petition on this issue is that there is "a need for prompt and definitive resolution of the question" regarding a federal court's jurisdiction to review state commission actions taken pursuant to the 1996 Act. United States' Petition at page 13-14. Of course, every litigant would like this Court to resolve

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[8] The Court of Appeals decision is reproduced in the Appendix to Verizon Maryland's Petition for a Writ of Certiorari in No. 00-1531 [hereafter Verizon App].

[9] Public Service Commission of Maryland Brief in Opposition to Verizon Maryland's Petition for a Writ of Certiorari (No. 00-1531) at page 17-27.

all of the issues impacting a claim.[10] The Court should find that this desire, in and of itself is not enough to justify granting a petition for writ of certiorari. Moreover, as discussed in the Maryland Commission's Opposition to Verizon's Petition for a Writ of Certiorari, the Court of Appeals was correct in holding that the federal district courts do not have independent subject matter jurisdiction under §1331 to review State commission decisions rendered pursuant to the 1996 Act.

The United States also raises the contention that the Illinois Commerce Commission ("ICC") and its Commissioners, who are the appellants in *Mathias*, may no longer have standing to seek review. Of course, the ICC is not a party to this proceeding and therefore cannot defend itself from this allegation. While the Maryland Commission was not a participant in any of the proceedings leading up to the *Mathias* appeal, the Maryland Commission notes that the Untied States' contention ignores the unusual procedural posture of that case. The District Court in Illinois took the unusual step of ruling on the merits of the complaint **first**. Judge Coar ruled on the merits on July 21, 1998. This judgment was entered on August 4, 1998. The District Court did not deny the ICC's motion to dismiss until August 25, 1998.[11] Thus, the ICC appealed the District Court's resolution of the Eleventh Amendment immunity issue as

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[10] If the United States and Verizon truly wanted to resolve **all** of the uncertainties surrounding federal court jurisdiction, they would have requested that the Court also resolve the issue of whether a State commission is an indispensable party such that suits cannot proceed in the absence of the State commission. Judge Smalkin of the Maryland District Court found that the Maryland Commission was an indispensable party. Verizon App. 84a-86a. The Fourth Circuit did not rule on this issue.

[11] See Joint Appendix, *Mathias, et. al. v. WorldCom Technologies*, et al., No. 00-878 at pages 3a-4a, 181a.

soon as possible. It would be manifestly unjust to deny the ICC the right to appeal this ruling.

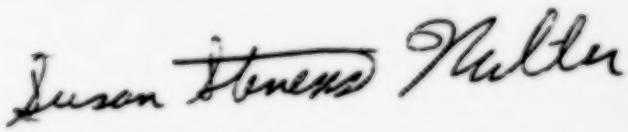
Finally, the Maryland Commission is forced to take issue with some "factual" statements made by the United States. The United States avers that the Maryland Commission "has voluntarily exercised regulatory authority under the 1996 Act". United States Petition at 6. Of course, whether any State commission acted "voluntarily" in implementing the 1996 Act goes to the heart of the question regarding whether the State has constructively waived its Eleventh Amendment immunity. The District Court of Maryland specifically found that the Maryland Commission did not constructively waive its Eleventh Amendment immunity by implementing the 1996 Act. Verizon App 77d-79a. The Fourth Circuit affirmed this holding. Verizon App 18a-21a. For the United States to imply that as a factual matter the Maryland Commission "voluntarily" implemented the 1996 Act is disingenuous at best.

CONCLUSION

The Maryland Commission does not oppose certiorari insofar as the United States seeks review of the Fourth Circuit's holdings concerning constructive waiver, the application of the *Ex parte Young* doctrine and the

extension of §252 (e)(6) jurisdiction to enforcement decisions of state commissions. In all other respects, the petition for certiorari should be denied.

Respectfully submitted,



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No. 00-1711

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 00-1711

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As we note in our petition for a writ of certiorari, this case presents essentially the same questions as does *Mathias* v. *WorldCom Technologies, Inc.* (No. 00-878): whether federal district courts have statutory jurisdiction to review decisions of state public utility commissions enforcing interconnection agreements entered into pursuant to the Telecommunications Act of 1996 (1996 Act), and, if so, whether state commissions or their commissioners may be made defendants to such proceedings consistent with the doctrine of sovereign immunity reflected in the Eleventh Amendment. Consequently, we have asked the Court either to hold our petition for disposition in light of *Mathias* or, alternatively, to grant the petition and to consider this case together with *Mathias*.

The respondents Public Service Commission of Maryland (MPSC) and its commissioners (collectively, MPSC) do not suggest that this case is an inappropriate

vehicle in which to consider those questions. Indeed, the MPSC expressly does not oppose certiorari on three of the four questions presented in our petition: whether 47 U.S.C. 252(e)(6), a provision of the 1996 Act, vests district courts with jurisdiction over suits contending that a state commission has enforced an interconnection agreement in a manner contrary to federal law; whether state commissions have waived their immunity from such suits by electing to exercise regulatory authority under the 1996 Act; and whether state commissioners, in their official capacities, may be made defendants to such suits under *Ex parte Young*, 209 U.S. 123 (1908). See MPSC Br. in Opp. 10, 12. The MPSC contests only whether certiorari is warranted on the remaining question presented in our petition: whether, if one assumes *arguendo* that 47 U.S.C. 252(e)(6) does not confer jurisdiction on district courts to review state commissions' enforcement decisions for compliance with federal law, district courts may exercise such jurisdiction under 28 U.S.C. 1331.

For the reasons articulated in our petition for a writ of certiorari, we believe that the Court could consider the Section 1331 question in *Mathias* itself. See Pet. 13. We have suggested, however, that if the Court has serious concerns about its ability in *Mathias* to reach that question or any of the other questions identified above, the Court should grant certiorari in this case as well.[1] The MPSC's assertion that the Section 1331

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[1] The MPSC asserts that *Mathias* is not "identical" to the present case because the underlying state commission decision in *Mathias* is "solely an enforcement decision," whereas the underlying state commission decision in this case is both "an enforcement order and an arbitration order." MPSC Br. in Opp. 9. The MPSC does not explain why such a distinction should have bearing on the questions before this Court. The Fourth Circuit, consistent with

question "is not an issue in *Mathias*" (MPSC Br. in Opp. 10), is accurate only to the extent that certiorari was not expressly sought or granted on that question. But that does not bar the Court from considering whether Section 1331 provides an alternative ground for affirmance of the Seventh Circuit's jurisdictional holding. As our petition notes (at 13), the plaintiff in *Mathias* invoked the district court's jurisdiction under both 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331. The district court, after holding that jurisdiction exists under Section 252(e)(6) to review state commission decisions enforcing interconnection agreements, explained that it therefore did not have to decide whether jurisdiction also exists under Section 1331. The Seventh Circuit presumably did not decide the Section 1331 question for the same reason.[2]

The MPSC argues that certiorari is not warranted on the Section 1331 question because "[t]he United States claims no conflict with any other Circuit Court." MPSC

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other circuits, agreed that a state commission decision approving an interconnection agreement, whether the agreement was negotiated between the parties or arbitrated by the state commission, is reviewable in district court under 47 U.S.C. 252(e)(6). See Verizon App. 38a-39a. No question is presented in *Mathias* or in this case concerning the jurisdiction of district courts over such decisions.

[2] As we note in our petition for a writ of certiorari (at 14), some question may exist with respect to the standing in this Court of the Illinois Commerce Commission (ICC) in *Mathias*, because the lower courts upheld the ICC's underlying decision on the merits. The MPSC argues that it would be "manifestly unjust to deny the ICC the right to appeal," at least with respect to the sovereign immunity issue. MPSC Br. in Opp. 11-12. It is unclear, however, whether a decision that the ICC lacked standing would be "unjust" at all, much less "manifestly" so, since the ICC would be free to litigate the jurisdictional and Eleventh Amendment issues in subsequent cases.

Br. in Opp. 10. The Fourth Circuit itself, however, indicated that its holding on that question is in tension with the Sixth Circuit's holding in *GTE North, Inc.* v. *Strand*, 209 F.3d 909, cert. denied, 121 S. Ct. 380 (2000). See Verizon App. 50a. In *GTE North*, the Sixth Circuit held that certain state commission orders, although not reviewable in district court under 47 U.S.C. 252(e)(6), nonetheless are reviewable under 28 U.S.C. 1331. 209 F.3d at 919-920. In so doing, the Sixth Circuit concluded, contrary to the Fourth Circuit here, that Section 252(e)(6) is not "the exclusive basis" for district court review of "state commission actions that in any way relate to interconnection agreements." *Id.* at 919. There is thus considerable tension, if not outright conflict, between the Sixth Circuit's decision in *GTE North* and the Fourth Circuit's decision in this case. See Verizon Pet. 15-17 (asserting "conflict" between *GTE North* and the decision here).[3]

In any event, whether or not the Section 1331 question, standing alone, would implicate a circuit conflict or otherwise warrant certiorari is beside the point. This Court has already granted certiorari in *Mathias* to consider whether district courts have jurisdiction under 47 U.S.C. 252(e)(6) to review state commission decisions

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[3] *GTE North* involved an order of a state commission that was issued outside "the § 252 process," 209 F.3d at 917, and that preceded the entry and approval of an interconnection agreement. (The Sixth Circuit assumed that interlocutory orders that *are* issued in the Section 252 process are not reviewable in federal court until they are incorporated into a final interconnection agreement.) This case, in contrast, involves a state commission order enforcing a previously approved interconnection agreement. The Sixth Circuit's analysis in *GTE North* could well extend, however, to the sort of order at issue here, if review of such orders were held not to be available under Section 252(e)(6).

enforcing interconnection agreements. If the Court were to decide that jurisdiction does not exist under that provision, without also deciding whether jurisdiction exists under 28 U.S.C. 1331, the uncertainty over whether the district courts may review state commissions' enforcement decisions would persist for at least another two years. Such continued uncertainty, and consequent continued litigation, would be contrary to the interests of the United States, of state regulators outside the Fourth Circuit, and of the telecommunications industry.

Finally, the MPSC summarily asserts that the Fourth Circuit was correct to hold that district courts do not have jurisdiction under Section 1331 over actions contending that a state commission has enforced an interconnection agreements in a manner contrary to federal law. MPSC Br. in Opp. 11. A full discussion of the merits of the Section 1331 question is beyond the scope of this brief. We note, however, that Section 252(e)(6) does not, as the court of appeals perceived (Verizon App. 48a), reflect any congressional intent to preclude actions in district court under more general jurisdictional provisions. Accordingly, even if the court of appeals were correct that Section 252(e)(6) itself authorizes review only of state commission decisions approving or disapproving interconnection agreements in the first instance, that would not constitute clear evidence of congressional intent to preclude review under Section 1331 of other state commission decisions concerning interconnection agreements. See *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (where statute contains no provision explicitly barring federal court review, "the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear th[e] action remains unimpaired").

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be held pending this Court's decision in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, and disposed of as appropriate in light of the decision in that case; alternatively, the petition should be granted and the case should be considered together with *Mathias*.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2001

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Nos. 00-1531 & 00-1711

IN THE

Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER VERIZON MARYLAND INC.

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September 10, 2001

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QUESTION PRESENTED

Whether a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were as follows:

American Communications Services of Marypland, Inc.

Bell Atlantic-Maryland, Inc. (now Verizon Maryland Inc.)

Susanne Brogan, in her official capacity as Commissioner of the Public Service Commission of Maryland

E. Mason Hendrickson, in his official capacity as Commissioner of the Public Service Commission of Maryland

Glenn F. Ivey, in his official capacity as Chairman of the Public Service Commission of Maryland

Claude M. Ligon, in his official capacity as Commissioner of the Public Service Commission of Maryland

MCI WorldCom, Inc.

MCImetro Access Transmission Services, Inc.

Maryland Office of People's Counsel

Public Service Commission of Maryland

RCN Telecom Services of Maryland, Inc.

Catherine I. Riley, in her official capacity as Commissioner of the Public Service Commission of Maryland

Starpower Communications, LLC

TCG-Maryland

United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Verizon Maryland Inc. states the following:

Verizon Maryland Inc. (formerly Bell Atlantic-Maryland, Inc.) is a wholly owned subsidiary of Verizon Communications Inc., a publicly held company. No publicly held company owns 10% or more of the stock of Verizon Communications Inc.

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IN THE

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No. 00-1531

VERIZON MARYLAND INC.,
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v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

No. 00-1711

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER VERIZON MARYLAND INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a)[1] is reported at 240 F.3d 279. The opinion of the district court (Pet. App. 73a-90a) is not reported. The order of the Maryland Public Service Commission (Pet. App. 91a-111a) is not reported.

[1] "Pet. App." refers to the appendix to the petition filed by Verizon Maryland Inc. in No. 00-1531.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The petition for a writ of certiorari in No. 00-1531 was filed on April 5, 2001, and the petition for a writ of certiorari in No. 00-1711 was filed on May 15, 2001. On June 25, 2001, both petitions were granted, limited to Question 2 presented by each petition. 121 S. Ct. 2548. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations, and 28 U.S.C. § 1331 are set forth at Pet. App. 112a-134a.

STATEMENT OF THE CASE

As required by the Telecommunications Act of 1996 ("1996 Act"), petitioner Verizon Maryland Inc. ("Verizon") entered into an "interconnection agreement" with respondent MFS Intelenet of Maryland, Inc. ("MFS"), a competitive local exchange carrier ("CLEC"). The interconnection agreement provided that "reciprocal compensation" — the amount that one interconnecting carrier pays another for traffic that originates on one network and terminates on the other — would be due only to the extent required by the 1996 Act. The Federal Communications Commission ("FCC") ruled that the 1996 Act does not require reciprocal compensation for Internet-bound traffic. The Maryland Public Service Commission ("PSC") nevertheless interpreted the interconnection agreement to require Verizon to pay MFS reciprocal compensation for Internet-bound traffic, a ruling that forced Verizon to transfer to MFS and other competitors many millions of dollars that it had never agreed to pay and that federal law did

not require it to pay. Verizon challenged the PSC's decision in federal district court, basing jurisdiction, in part, on 28 U.S.C. § 1331.

The question presented by this case is whether a federal court may exercise § 1331 "arising under" jurisdiction in an action alleging that a state commission has interpreted or enforced a 1996 Act interconnection agreement in violation of federal law.

1. Interconnection Agreements and the 1996 Act. The 1996 Act "fundamentally restructures local telephone markets" by subjecting incumbent local telephone companies to "a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The documents detailing incumbents' duties, though referred to as "interconnection agreements," are not voluntary contracts in any ordinary sense. An incumbent local exchange carrier ("LEC") has no choice about whether to enter into such an "agreement" when a CLEC makes a request. On the contrary, the 1996 Act requires incumbents, upon a CLEC's request, "to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill" the 1996 Act's substantive duties. 47 U.S.C. § 251(c)(1); *see also id.* § 252(a)(1).

Although carriers are permitted to "negotiate and enter into a binding agreement . . . without regard to the standards set forth" in the 1996 Act (*id.* § 252(a)(1)), "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act" (*AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000)). That is so because the Act, as interpreted by the FCC, effectively discourages attempts to negotiate terms that provide either less or more than the Act requires.

First, parties negotiate against the backdrop of statutory and regulatory requirements that dictate the

minimum terms to which an incumbent carrier will be held in the absence of a negotiated agreement. Section 252(b) provides that either party to a negotiation may "petition the state commission . . . to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." *AT&T*, 525 U.S. at 373; *see* 47 U.S.C. § 252(b), (c). Accordingly, so long as an issue has already been "resolved by . . . FCC Rules and interpretations," a CLEC has little motivation to accept anything less than the federal requirement. *AT&T Communications*, 229 F.3d at 465.

Second, an incumbent is discouraged from agreeing to anything that exceeds its obligations under federal law because "any interconnection, service, or network element provided under an agreement approved under" § 252 must be made available to "any other requesting telecommunications carrier upon the same terms and conditions." 47 U.S.C. § 252(i). As a consequence, an incumbent cannot safely engage in ordinary "give-and-take" because, as the FCC has interpreted § 252(i), "every concession . . . made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant." *AT&T*, 525 U.S. at 395. Together, therefore, §§ 252(b) and 252(i) impel the parties to match the terms of their interconnection agreement to the commands of federal law.

Whether an agreement is arrived at by negotiation or arbitration, the parties must submit the agreement to the appropriate state public utility commission for approval and public filing. *See* 47 U.S.C. § 252(a)(1), (e)(1). Once an agreement has been approved, federal law requires the parties to abide by its terms. Section 252(a)(1) explicitly provides that interconnection agreements are "binding." *Id.* § 252(a)(1). Likewise, several provisions in § 251 refer to the obligation of incumbent carriers to provide network access and interconnection "in accordance with the terms and

conditions of the agreement." *See id.* § 251(c)(2)(D), (c)(3). In short, the obligations imposed by an interconnection agreement are not private contractual obligations, but federal regulatory obligations that apply equally to all similarly situated telecommunications carriers.

2. Reciprocal Compensation and the Internet. Section 251(b)(5) requires LECs to enter into "reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b)(5). Under "reciprocal compensation," when a customer of Carrier A places a call to a customer of Carrier B in the same local calling area, Carrier A pays Carrier B for terminating that local call. Likewise, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A for terminating the call.

The FCC has consistently held that § 251(b)(5)'s reciprocal-compensation obligation applies only to intra-exchange telecommunications traffic (that is, calls that originate and terminate within the same local calling area). For non-local or "interexchange" calls, a different set of rules applies (those governing long-distance "access charges").[2]

The application of this rule to traditional local voice telephone calls has been relatively straightforward, but the question whether reciprocal compensation applies to Internet-bound calls has given rise to disputes. A customer typically initiates an Internet session by

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013, ¶ 1034 (1996) (subsequent history omitted); *see also* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, 2001 WL 431687, ¶¶ 36-37 (rel. Apr. 27, 2001) ("*ISP Remand Order*") (confirming that § 251(b)(5) does not apply to "access services or services associated with access"), *petitions for review pending*, Nos. 01-1218 *et al.* (D.C. Cir.).

using a modem to connect to the facilities of an Internet service provider, or "ISP," such as America Online. The ISP then completes the communication link by connecting the customer to the requested website, which may be located anywhere in the world.

CLECs have typically argued that, because many ISP access numbers are "local" — that is, associated with the subscriber's local calling area — Internet-bound calls are subject to reciprocal compensation under § 251(b)(5). Incumbents, by contrast, have typically maintained that Internet-bound calls are interstate and interexchange in nature, because such calls do not terminate at the ISP's modem but continue in an unbroken transmission to distant websites. Before the FCC definitively resolved this issue, a number of state commissions had ruled that Internet-bound calls are actually two calls — a local call to the ISP and a subsequent communication between the ISP and the distant website — and that the initial call to the ISP is local in nature and therefore subject to reciprocal compensation.

The FCC has made clear that those rulings were incorrect. It has repeatedly ruled that an Internet-bound call is a single end-to-end communication between the customer and the distant website, a call that is therefore interstate and interexchange. *See ISP Remand Order* ¶¶ 58-60. The agency has specifically ruled that, because Internet-bound traffic is interstate access traffic, it is "not subject to the reciprocal compensation requirement in section 251(b)[(5)]." *Id.* ¶ 23; *accord id.* ¶ 30.

The FCC also explained in detail that the decisions of various state commissions requiring payment of reciprocal compensation for Internet-bound traffic have directly undermined the goals of the 1996 Act. Such rulings have "led to classic regulatory arbitrage," were

a "windfall" for CLECs, and "distort[ed] the development of competitive markets." *Id.* ¶¶ 21, 29, 70. Such payments give CLECs "every incentive to compete, not on [the] basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers." *Id.* ¶ 4. The FCC expressed its approval of state commission decisions denying CLECs compensation for Internet-bound calls (*id.* ¶¶ 80, 82); it also preempted contrary decisions on a going-forward basis and imposed a federal compensation mechanism, intended gradually to eliminate such payments. At the same time, the *ISP Remand Order* did not purport to affect prior state commission decisions that had ordered reciprocal compensation, leaving that matter to the ordinary process of judicial review.

3. The Dispute Below. In May 1997 — well before the FCC had addressed the issue of reciprocal compensation for Internet-bound traffic — MFS filed a complaint with the Maryland PSC alleging that Verizon's refusal to pay reciprocal compensation on Internet-bound traffic violated the 1996 Act and the parties' interconnection agreement. The PSC ruled that Internet-bound calls are local and therefore subject to reciprocal compensation. Pet. App. 94a-96a. The PSC promised to revisit its determination, however, in the event that subsequent FCC rulings had a bearing on the subject. *Id.* at 106a-107a.

In February 1999, the FCC expressly ruled that Internet-bound calls are non-local calls that do not qualify for reciprocal compensation under § 251(b)(5). *See* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999).[3] Immediately

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[3] This ruling was vacated by the D.C. Circuit in *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). The *ISP Remand Order* reaffirmed the FCC's prior conclusion.

thereafter, Verizon asked the PSC to revise its own prior determination in light of the FCC's controlling interpretation of federal law. The operative language of the governing interconnection agreement left no doubt that the parties' obligations tracked those imposed under federal law. The agreement provides:

> "Reciprocal Compensation" is As Described in the [1996] Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic . . . .

See C.A. App. 55; Pet. App. 101a. The agreement also defines "Local Traffic" in a manner that tracks the then-existing FCC regulation almost word for word. *See* C.A. App. 53; Pet. App. 101a.[4]

Nonetheless, a sharply divided PSC refused, by a 3-2 vote, to alter its earlier determination. Instead, it ruled that, because "the treatment of [Internet-bound] traffic as local was so prevalent in the industry," Verizon "had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding [Internet-bound] traffic from the definition of local traffic subject to the payment of reciprocal compensation." Pet. App. 103a. The majority also expressed concern that the FCC's holding (that Internet-bound traffic is not subject to reciprocal compensation) "will result in CLECs receiving no compensation for terminating [Internet]-bound traffic"; it therefore adopted an interim compensation mechanism for Internet-bound traffic in direct conflict with the federal rule. *Id.* at 106a-107a.[5]

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[4] After the PSC approved the Verizon-MFS agreement, a number of other CLECs adopted the relevant provisions of the agreement pursuant to § 252(i) and the FCC's implementing regulations.

[5] The district court held that this aspect of the PSC's decision was not ripe for review. Pet. App. 89a. Neither party appealed that holding.

4. The Proceedings Below. Verizon sought review of the PSC's decision in the United States District Court for the District of Maryland, citing as the basis for jurisdiction 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. The complaint named as defendants the Maryland PSC, the members of the Maryland PSC in their official capacity, MFS, and the five other affected carriers.

On the PSC's motion, the district court dismissed the complaint on the ground that the Eleventh Amendment precluded its exercise of subject matter jurisdiction under either § 252(e)(6) or § 1331. Pet. App. 73a-90a.

A divided panel of the Fourth Circuit affirmed. *Id.* at 1a-72a. The majority began by rejecting Verizon's Eleventh Amendment arguments, holding both that the PSC did not waive its immunity from suit in federal court by voluntarily participating in the 1996 Act's regulatory scheme (*id.* at 14a-21a), and that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit this action to proceed against the individual members of the PSC in their official capacity to restrain ongoing violations of federal law (Pet. App. 21a-30a). Having ruled that neither the PSC nor its members could lawfully be made parties to the federal court action, the court held next that the district court lacked jurisdiction under § 252(e)(6) to allow the action to proceed against the private defendants. *Id.* at 30a-47a.

Finally, on the specific question presented here, the majority held that "28 U.S.C. § 1331 does not provide federal jurisdiction over [Verizon's] claims" because, in its judgment, "Congress intended that federal jurisdiction be limited to the grant in 47 U.S.C. § 252(e)(6)." *Id.* at 50a. The court predicated its holding, in part, on

its view that the *Rooker-Feldman* doctrine[6] — under which "lower federal courts are not authorized to review final judgments from State court proceedings" (*id.* at 50a n.8) — should be extended to prohibit, "in the absence of specific federal authorization," federal court review of orders issued by "a State quasi-judicial body, such as the Maryland Public Service Commission." *Id.* at 50a. The court acknowledged that its ruling on § 1331 conflicted with the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909, 919 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000). *See* Pet. App. 50a.

Judge King dissented. Concerned that the majority had "isolate[d] itself . . . from every other court of appeals that has decided these issues" (*id.* at 52a), and "find[ing] these [other] decisions highly persuasive in addressing the jurisdictional and immunity issues" (*id.* at 53a-54a), Judge King concluded (i) that "§ 252(e)(6) expressly confers jurisdiction on the federal courts to review the states' enforcement determinations" (*id.* at 56a); (ii) that "a state waives the defense of sovereign immunity by electing to participate in the regulation of interconnection agreements" (*id.* at 59a); and (iii) that, "[e]ven if Maryland had not waived its Eleventh Amendment immunity, the individual members of the Commission still may be sued in their individual capacities, pursuant to *Ex parte Young*, for prospective injunctive relief" (*id.* at 67a). Because Judge King believed that "jurisdiction is provided in the district courts by § 252(e)(6)," he found it "unnecessary . . . to reach the argument that 28 U.S.C. § 1331 confers general federal question jurisdiction." *Id.* at 58a n.5. He added, however, that, "contrary to the assertion of

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[6] The *Rooker-Feldman* doctrine refers to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

the majority, the *Rooker-Feldman* doctrine has no application here." *Id.* (citation omitted).

5. The Grant of Certiorari. Both Verizon and the United States filed petitions for writs of certiorari raising all four issues (jurisdiction under § 252(e)(6), jurisdiction under § 1331, Eleventh Amendment waiver, and *Ex parte Young*). This Court granted both petitions, limiting its grant to Question 2 presented by each petition — whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. The Court consolidated the cases and set them for oral argument in tandem with No. 00-878, *Mathias v. WorldCom Technologies, Inc.*, which presents the remaining three questions raised by the petitions for writs of certiorari in this case.

SUMMARY OF ARGUMENT

Section 1331 grants federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A civil action "arises under" federal law for purposes of § 1331 when "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997). Verizon's claim below — that the PSC's determination violated the federal Telecommunications Act of 1996 — plainly satisfies that test. Moreover, neither the 1996 Act nor this Court's *Rooker-Feldman* doctrine divests a federal district court of jurisdiction over a case like this one.

I. An action seeking review of a state commission's interpretation of a 1996 Act interconnection agreement arises under federal law.

A. In the 1996 Act, Congress granted incumbent carriers the statutory right to "negotiate and enter into *a binding agreement* with the requesting telecommunications carrier or carriers," and to do so "without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a)(1) (emphasis added). Federal law thus gives Verizon the right to insist that it be held only to the terms of the interconnection agreement to which it actually agreed. The statutory right granted under § 252(a) is accordingly "an element, and an essential one," of Verizon's claim.

B. Any claim relating to the rights and obligations imposed under a 1996 Act interconnection agreement raises questions of federal law. Contrary to the court of appeals' apparent understanding, interconnection agreements are not ordinary state-law contracts, but rather "federal contract[s]," the interpretation or enforcement of which, under this Court's precedents, raises questions of federal law subject to federal court jurisdiction under § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963). Like the Railway Labor Act contracts at issue in *Central Airlines*, interconnection agreements "are creations of federal law and bound to the statute and its policy"; they are "therefore governed and enforceable by federal law, in the federal courts." *Id.*

That conclusion is fortified by a separate line of this Court's decisions. Because federal law mandates the creation of interconnection agreements, stipulates that they include a detailed schedule of charges, directs that they be published, requires a carrier to provide service according to their terms, and specifies that service must be made available on the same terms to all parties, these 1996 Act agreements are functionally

indistinguishable from federal tariffs. Insofar as interconnection agreements possess the core characteristics of tariffs, this Court's precedents strongly suggest that a claim involving enforcement of such an agreement, like a claim involving enforcement of a federal tariff, necessarily arises under federal law and presents questions reviewable in federal court. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983) (per curiam); *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918).

II. No other law barred the district court from exercising the jurisdiction granted to it under § 1331.

A. Nothing in the 1996 Act suggests that Congress intended to restrict the jurisdiction of the federal courts in cases like this one. The 1996 Act specifically confers jurisdiction on federal courts under § 252(e)(6) and withdraws jurisdiction from state courts under § 252(e)(4). To the extent those sections do not reach this case, the statute is silent on the proper method for review. This Court has held that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Stark v. Wickard*, 321 U.S. 288, 309 (1944). This is true even if the statute in question specifically provides for judicial review in other circumstances. *Id.*; *see also Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991).

B. The *Rooker-Feldman* doctrine does not divest the federal court of its federal-question jurisdiction in a case like this one. That doctrine "interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622 (1989). The doctrine has no application to judicial review of

determinations by a state administrative agency. As this Court held in *City of Chicago*, "federal jurisdiction generally encompasses judicial review of state administrative decisions." 522 U.S. at 169.

That holding applies with full force here. First, the PSC was exercising authority granted to it under *federal* law, not merely under state law. Just as federal courts have jurisdiction to review action by federal agencies, they likewise have jurisdiction to review action by state agencies exercising federal statutory authority. Second, unlike the situation in *City of Chicago*, *all* of Verizon's claims arise under federal law. Thus, there is no issue here concerning litigation of state-law issues in federal court. For the same reason, the concerns that animate abstention doctrine have no application to this case.

ARGUMENT

At issue in this case is whether a federal district court has jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission has interpreted a 1996 Act interconnection agreement in a manner consistent with federal law. This Court has already suggested the answer to that question, having observed that "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T*, 525 U.S. at 378 n.6.

That principle applies here: it is a core function of the federal courts to ensure that federal administrative authority is exercised in accordance with governing federal law. "From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting

Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)) (alteration in original). Such review is fundamental to the constitutional legitimacy of the delegation of power by Congress. "The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Stark*, 321 U.S. at 310. "[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id.*

It is of no consequence that the PSC is a state rather than a federal agency. *See City of Chicago*, 522 U.S. at 169. In resolving the dispute between the private parties before it concerning the scope of Verizon's duties under the interconnection agreements at issue, the PSC was exercising federal authority under a federal statute that sets forth Congress's scheme for regulation of local telecommunications markets. For that reason, if the PSC had declined to exercise that authority, as it was free to do, the FCC would have had to step in and "assume the responsibility of the State commission . . . with respect to the proceeding or matter." 47 U.S.C. § 252(e)(5).[7] In the PSC's view,

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[7] The FCC did precisely that when the Virginia State Corporation Commission declined to act in a case involving issues similar to those that the PSC addressed in the decision at issue here. The FCC ruled that the Virginia commission's refusal to "interpret and enforce . . . interconnection agreements" constituted a "'fail[ure] to act to carry out its responsibility' *under section 252*," and it accordingly preempted the Virginia commission's jurisdiction and assumed its responsibility to decide the matter. Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000) (quoting 47 U.S.C. § 252(e)(5)) (emphasis added).

Congress's scheme required the transfer of millions of dollars from Verizon to the private defendants below. Verizon's claim is that federal law does not authorize the exaction the PSC imposed. Under settled law, such a claim invokes the jurisdiction of the federal courts.

I. VERIZON'S CLAIM ARISES UNDER FEDERAL LAW

"For purposes of determining whether jurisdiction exists under § 1331(a) . . . , it is not necessary to decide whether [Verizon's] alleged cause of action . . . is in fact a cause of action 'on which [Verizon] could actually recover.'" *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70 (1978) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Rather, the test is whether the claimed right is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974). When a plaintiff claims that "'federally protected rights have been invaded,'" the "allegations are sufficient to sustain jurisdiction under § 1331(a)." *Duke Power*, 438 U.S. at 71 (quoting *Bell*, 327 U.S. at 684).

Verizon's claim rests on at least two sources of federal rights that the PSC's determination directly invaded. The first is the statutory right to enter into a "binding agreement" without regard to requirements that would otherwise be imposed under federal law. 47 U.S.C. § 252(a)(1). The second is the interconnection agreements themselves; the rights and obligations that arise thereunder are intrinsically federal in nature. Either source of rights establishes an independent and sufficient basis for federal court jurisdiction.

A. A Federal District Court Has Jurisdiction To Determine Whether the PSC's Interpretation Violates Verizon's Federally Protected Right To Enter into "Binding Agreement[s]"

Verizon's fundamental claim is that, in requiring Verizon to pay reciprocal compensation on Internet-bound traffic, the PSC acted contrary to the terms of the governing interconnection agreement, when read in light of controlling federal law. If that claim is correct — and it must be accepted as correct for purposes of determining the district court's jurisdiction — the PSC's determination violated § 252(a)(1), which provides that incumbent LECs may "negotiate and enter into a binding agreement . . . without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a)(1). Because federal law dictates that interconnection agreements, duly negotiated, approved, and filed in accordance with the requirements of § 252, are binding, a state commission is not permitted to impose obligations inconsistent with their terms.

The statutory right at issue is central to the congressional scheme. The obligations imposed on incumbent LECs under the 1996 Act represent an unprecedented intrusion on their right to control their own property. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000) (noting that the 1996 Act imposes "a host" of "affirmative duties to help one's competitors"). To reduce somewhat the intrusion that this regulation represents, Congress permits incumbents, in the first instance, to establish the terms of agreements free from direct regulatory interference. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793 n.9 (8th Cir. 1997) ("an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations"), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). That

relative freedom from the direct imposition of regulatory duties in circumstances where the parties have agreed to terms implementing the statute would be lost if a state commission were free to impose obligations notwithstanding the contrary terms of an interconnection agreement. It is, in part, the commission's lack of power to impose such obligations that gives meaning to § 252(a)(1).

For example, a state commission might regard an agreement to limit reciprocal compensation payments to those calls that are subject to reciprocal compensation under the 1996 Act as unwise for policy reasons. It might be "concerned" that such an agreement would "result in CLECs receiving no compensation for terminating [Internet]-bound traffic." Pet. App. 106a. It might believe that CLECs "incur costs to terminate" such traffic and that, absent reciprocal compensation, "CLECs will be forced to absorb these costs." *Id.* at 106a-107a. And it might, for this reason, labor to find a way around the plain language of an interconnection agreement, thereby rendering the parties' agreement non-binding and denying the incumbent its rights under § 252(a).

A state commission need not *deliberately* misconstrue an interconnection agreement to deny a party its rights under § 252(a). Whenever a state commission misinterprets an interconnection agreement the injury to the rights of the aggrieved party is the same. In judging whether a state commission's interpretation of an agreement is wrong, the district court's scope of review is a familiar one. *See, e.g., Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 185 (1938) (the question is "whether the [agency] in arriving at its determination departed from the applicable rules of law"). If the state commission's determination cannot withstand such review, it is inconsistent with § 252(a).

The circumstances of this case demonstrate the importance of that principle. The parties' agreement here provides that "Reciprocal Compensation" is "As Described in the Act," a defined term that means "as described in or required by the [1996] Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the [PSC]." Interconnection Agreement §§ 1.7, 1.61 (*see* C.A. App. 49, 55; Pet. App. 101a). The agreement further provides that reciprocal compensation is limited to "Local Traffic," defined as traffic that "is originated" and "terminates" within the same local calling area. *Id.* § 1.44 (*see* C.A. App. 53; Pet. App. 101a).

Verizon's claim is that the parties' agreement means what it says: reciprocal compensation is "as described in or required by the [1996] Act." And Verizon further claims that, as a matter of federal law, payment of compensation for Internet-bound traffic is *not* reciprocal compensation "as described in or required by the [1996] Act." The FCC has recently confirmed that understanding of federal law. *See ISP Remand Order* ¶ 23 (holding that the 1996 Act does not require payment of reciprocal compensation for Internet-bound traffic); *cf.* Interconnection Agreement § 1.7 (recognizing binding effect of "duly authorized rules and regulations of the FCC") (*see* C.A. App. 49).

The agreement's express incorporation of the federal statutory standard governing reciprocal compensation accentuates the federal interest in this case. As noted above, parties often adopt provisions that "fulfill the duties described in [§ 251(b) and (c)]" (47 U.S.C. § 251(c)(1)) by tracking the requirements imposed by those statutory provisions and the FCC's implementing regulations. *See AT&T Communications*, 229 F.3d at 465). A state commission's construction of such provisions is therefore tantamount to an interpretation of the 1996 Act and the FCC's regulations. Recognizing that such determinations involve matters of federal law

prevents state commissions from disturbing the balance of interests struck by Congress and promotes uniformity in the application of federal law. Indeed, the identical dispute over the requirements of federal law may arise either before or after an agreement is approved. In both circumstances, judicial review for consistency with federal law ensures that Congress's legislative choices will be respected.

B. Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law

Even if § 252(a) did not grant Verizon an express statutory right to be held only to those obligations contained in its interconnection agreement, there is no question that Verizon's claims here depend on rights and obligations derived from the parties' interconnection agreement. In a regulatory scheme like the 1996 Act, where the governing document implements underlying federal statutory duties, the rights and duties imposed by those documents are questions of federal law. Two related lines of authority make that conclusion inescapable.

1. Disputes concerning 1996 Act interconnection agreements satisfy the "arising under" requirement of § 1331 because such documents are federal contracts that implement federal policy and embody federal standards. Unlike ordinary commercial contracts, which reflect voluntary undertakings by willing parties acting without legal compulsion, 1996 Act interconnection agreements are the product of federal legal coercion designed to implement federal obligations. Incumbent LECs such as Verizon are required by federal law to negotiate these agreements to discharge their obligations under the 1996 Act — specifically, "to fulfill the duties described in [§ 251(b) and (c)]." 47 U.S.C. § 251(c)(1). Federal law, moreover, requires incumbents to enter into good-faith negotiations at the behest of a requesting carrier even if they would

otherwise be unwilling to do so — indeed, even if state law would otherwise *prohibit* such inter-carrier negotiations and agreements. *See id.* § 261(c).

Further, federal law enumerates the specific duties that are subject to negotiation, establishes the minimum terms to which an incumbent must "agree" on request, and subjects the resulting agreements to governmental approval under specified federal standards, without which the agreement has no effect. *See id.* §§ 251(b)-(c), 252(e). Federal law further requires that these agreements be publicly filed, and it provides that the incumbent carrier must make the provisions of any approved interconnection agreement available to any other requesting carrier on the same terms and conditions. *See id.* § 252(h), (i). Finally, once such an agreement is approved, the incumbent has a federal-law duty to provide service "in accordance with the terms and conditions of the agreement." *Id.* § 251(c)(2)(D), (c)(3).

One cannot fairly describe such agreements as a genuine product of the parties' voluntary consent. On the contrary, they reflect the positive command of federal law. In closely analogous circumstances, this Court held that a dispute over the construction of a labor-management agreement entered into pursuant to § 204 of the Railway Labor Act raised a federal question for purposes of § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. at 695-96. The reasoning in that case compels the same conclusion here.

Under § 204, airlines and their employees were required to establish a board of adjustment to settle employee grievances. *Id.* at 686. A contract between an airline and a union established such a board, and the board ruled against the airline in a grievance proceeding. When the airline refused to comply, the union brought a federal action to enforce its award.

The court of appeals, affirming an order dismissing the case for lack of jurisdiction, held that the complaint "did not disclose 'affirmatively a federally-created cause of action' and that 'this suit is nothing more than a state-created action to construe a contract.'" *Id.* at 684.

This Court unanimously reversed. The Court noted that the duty to establish adjustment boards was imposed under § 204 and that "[t]he extent and nature of the legal consequences of this duty though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Id.* at 690-91 (internal quotation marks omitted). For this reason, it was

> the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme.

Id. at 691. Accordingly, the Court concluded, "the § 204 contract . . . is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." *Id.* at 692. Other decisions are to the same effect. *See, e.g., Norfolk & Western Ry. v. Nemitz,* 404 U.S. 37 (1971) (concluding that a dispute arising out of an agreement implementing obligations under the Interstate Commerce Act raised a federal question);

American Surety Co. v. Schultz, 237 U.S. 159 (1915) (holding that suit to enforce an appeal bond given to satisfy requirements of federal law raised a federal question).

This case is indistinguishable. Here, as in *Central Airlines*, it is federal law — specifically, §§ 251 and 252 — that determines whether the "contractual arrangements made by the parties are sufficient to discharge the mandate" of those sections; it is "federal law which would determine whether a [1996 Act interconnection agreement] is valid and enforceable according to its terms." *See* 47 U.S.C. § 252(e) (establishing federal standard for approval of interconnection agreements). Moreover, as with the § 204 contracts at issue in *Central Airlines*, 1996 Act interconnection agreements are Congress's chosen means for implementing the substantive duties contained in §§ 251 and 252: "[T]he federal statute is the source of the power and authority . . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction." *Central Airlines*, 372 U.S. at 692 (ellipses and alteration in original; internal quotation marks omitted).[8] Finally,

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[8] Contrary to the Fourth Circuit's view (*see* Pet. App. 49a), this case is nothing like *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). The plaintiffs in that case brought a state-law cause of action to vindicate rights established by state law; they claimed federal jurisdiction based only on the fact that the applicable standard of care under state law was based on a federal statute. It was conceded that Congress had "determin[ed] to preclude federal private remedies" for violation of the federal statute. *Id.* at 814. On the basis of that assumption, the Court held "simply . . . that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* Here, by contrast, the rights to be protected are federal rights, arising from federal contracts, to be construed in accordance with federal law.

the allegation here is that the PSC has interpreted the interconnection agreement in a manner "contrary to the federal command" (*id.* at 691) and, as the FCC has made clear in its *ISP Remand Order*, "fatal to the goals of the Act" (*id.*).

The Fourth Circuit — while apparently acknowledging that "interconnection agreements are 'creations of federal law'" (Pet. App. 49a) — paradoxically concluded that the construction of the contract presented "a matter of State contract law" (*id.* at 27a) that did not raise a federal question. The court sought support for its view in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). But, if anything, that case cuts in the opposite direction.

In *Jackson Transit*, this Court reaffirmed the principle that "suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." *Id.* at 22. The decisive question, the Court reasoned, is whether Congress intended the contracts at issue to be "'creations of federal law'" and "the rights and duties contained in those contracts [to] be federal in nature." *Id.* at 23 (quoting *Central Airlines*, 372 U.S. at 692). The circumstances here amply satisfy that standard.

Although the Court in *Jackson Transit* observed that "the statute seems to make § 13(c) agreements and collective-bargaining contracts creatures of federal law" (*id.*), the specific case at issue involved a contract between a local government and its employees. The Court determined that "labor relations between local governments and their employees are the subject of a longstanding statutory exemption" and that § 13(c) "evince[d] no congressional intent to upset" that

exemption. *Id.* at 23, 24. Finding the statute inconclusive, the Court relied on explicit and "conclusive" legislative history to determine that Congress had "intended that labor relations between transit workers and local governments would be controlled by state law" to be "applied in state courts." *Id.* at 24, 29.

Contrary to the Fourth Circuit's view, however, that is not the case here. Nothing in the text or legislative history of the 1996 Act supports the court's inference that, insofar as § 252(e)(6) does not apply, Congress intended the relations between incumbent carriers and CLECs to be governed by state law or "for the right of review to be exercised in State courts." Pet. App. 49a. On the contrary, as this Court has said, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T*, 525 U.S. at 378 n.6.

Under the 1996 Act, the relationship between incumbents and competitors is governed by interconnection agreements that are binding as a matter of federal law. Because those agreements are central to the realization of Congress's goals, the rights and duties arising out of such agreements are matters of federal law under this Court's precedents. Accordingly, where a plaintiff's claim for relief depends on the construction of such an interconnection agreement, the claim arises under federal law for purposes of § 1331.

2. A separate line of this Court's precedents — holding that the construction of a federal tariff raises issues of federal law — likewise supports § 1331 jurisdiction in this case. Interconnection agreements under the 1996 Act serve essentially the same function as, and evince the central attributes of, federal tariffs. The Act requires incumbent LECs to negotiate such agreements on request (47 U.S.C. §§ 251(c)(1), 252(a)(1)), to include in each such agreement "a detailed schedule of itemized

charges" (*id.* § 252(a)(1)), to file approved agreements with the state commission for public inspection (*id.* § 252(h)), to provide service according to their terms (*id.* § 251(c)(2)(D), (c)(3)), and to make the same provisions available to all other telecommunications carriers on the same terms and conditions (*id.* § 252(i)). Those provisions directly parallel the requirements that the Communications Act of 1934 imposes with respect to traditional common-carrier services. Thus, common carriers must "furnish . . . communication service upon reasonable request" (*id.* § 201(a)), must include in each tariff "schedules showing all charges" (*id.* § 203(a)), must file tariffs with the FCC for public inspection (*id.*), must provide service solely according to their terms (*id.* § 203(b)), and must provide service on the same terms to all comers (*id.* § 202(a)).

In sum, 1996 Act interconnection agreements function in all material respects as federal tariffs. This Court's jurisdictional decisions concerning federal tariffs therefore bear directly on the issue here. And those decisions hold consistently that a claim involving interpretation or enforcement of a federal tariff necessarily arises under federal law and presents questions reviewable in federal court.

In this Court's leading decision on the subject, *Louisville & N.R.R. v. Rice*, the plaintiff railroad sued to recover money "claimed to be due under tariffs approved and published as required by [the] Interstate Commerce Act." 247 U.S. at 201. The district court dismissed the action for lack of jurisdiction, and this Court reversed. Noting that "[t]he Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff," the Court concluded that "[t]heir duty and obligation grow out of and depend upon that act." *Id.* at 202. "The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved

as required by Interstate Commerce Act; result of the action necessarily depended upon construction and effect of that act." *Id.* at 203. *See also Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 290 (1922) ("Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law.").

More recently, a unanimous Court reaffirmed that holding in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.* As in *Rice*, the plaintiff common carrier sued to collect charges said to be owed under "tariffs on file with the [Interstate Commerce] Commission." 460 U.S. at 533. The district court dismissed the claim; the Ninth Circuit affirmed, characterizing the suit as a "simple contract-collection action." *Id.* (internal quotation marks omitted). This Court summarily reversed. Relying on *Rice*, the Court held that, in any case involving a claim under a federal tariff, "'the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation.'" *Id.* at 535 (quoting *Rice*, 247 U.S. at 203). "A carrier's claim is, of necessity, predicated on the tariff" and therefore implicates the federal statute. *Id.*[9] This rule has been widely applied by the federal courts of appeals

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[9] Both *Rice* and *Thurston Motor Lines* involved the scope of federal jurisdiction under 28 U.S.C. § 1337. With the removal of the amount-in-controversy requirement in 28 U.S.C. § 1331, any claim "arising under any Act of Congress regulating commerce" (28 U.S.C. § 1337(a)) necessarily also "aris[es] under the . . . laws . . . of the United States" (*id.* § 1331). *See, e.g., ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998) ("[A]ny action that could be brought in federal court under § 1337 could also be brought under § 1331."); *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (Posner, J.); 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3574, at 236 & n.5 (2d ed. 1984).

to federal tariffs filed with the FCC pursuant to § 203 of the Communications Act.[10]

The same considerations that established federal jurisdiction in *Rice* and *Thurston Motor Lines* support federal jurisdiction here. An incumbent carrier's "duties and obligations" under a 1996 Act interconnection agreement, like its duties under a federal tariff, arise from federal law, and that is true even if, as here, the particular terms at issue were the result of "voluntary" negotiation rather than arbitration. As we have shown, such negotiations necessarily occur in the context of a statutory and regulatory regime that specifies the minimum terms to which state commissions will hold an incumbent carrier in the absence of a negotiated agreement. As the Fourth Circuit itself explained in a prior 1996 Act case, "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications*, 229 F.3d at 465.

Moreover, tariffs that are the product of negotiations are not for that reason immune from treatment as tariffs. For example, in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), natural gas producers negotiated a price schedule with purchasers; the contract was filed with the Federal Power Commission, which authorized the sale. *Id.* at 573-74. The Court held that

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[10] *See, e.g., Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 482, 488 (2d Cir. 1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir.) (Posner, J.), *cert denied*, 524 U.S. 952 (1998); *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3d Cir. 1995), *cert. denied*, 519 U.S. 815 (1996); *Western Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479-80 (6th Cir. 1993); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387-88 (8th Cir. 1992). *See also AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (noting that Communications Act's provisions "are modeled after similar provisions of the Interstate Commerce Act . . . and share its goal of preventing unreasonable and discriminatory charges").

the filed rate doctrine applied fully to those rates. *Id.* at 577-79. *See also* 47 C.F.R. § 61.55 (governing "contract-based tariffs"); *Fax Telecommunicaciones*, 138 F.3d at 482, 488; *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) ("rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers" are lawful tariffs if "filed with the FCC"); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1316-19 (D.C. Cir. 1984).

It follows that 1996 Act interconnection agreements, like federal tariffs, are governed by federal law. A claim challenging a state agency's interpretation of such an agreement therefore arises under federal law and is subject to the § 1331 jurisdiction of the federal courts.

II. NO OTHER PROVISION OF LAW DEPRIVES FEDERAL COURTS OF JURISDICTION OVER CLAIMS LIKE VERIZON'S

Because Verizon's claims arise under federal law, the requirement for district court jurisdiction under 28 U.S.C. § 1331 is satisfied. The sole remaining question, therefore, is whether any other provision of law withdraws that federal jurisdiction.

The Fourth Circuit invoked two possible statutory limitations. First, the court held that § 252(e)(6) does not apply to state commission decisions interpreting or enforcing interconnection agreements. It then inferred that, because "Congress created a limited federal right of review of State commission determinations as defined in 47 U.S.C. § 252(e)(6)," it must have "intended for the right of review to be exercised in State courts" whenever § 252(e)(6) does not apply. Pet. App. 49a. Second, the Fourth Circuit believed that, "in the absence of specific federal authorization," it would "violate basic tenets of federalism" to permit a federal

court to "review a State quasi-judicial body." *Id.* at 50a.[11]

For the reasons set forth below, neither of these sources of law bars a district court's exercise of subject matter jurisdiction in this case.

A. Section 252(e)(6) Does Not Withdraw Subject Matter Jurisdiction from the Federal Courts

Verizon has consistently maintained that § 252(e)(6) provides an explicit cause of action for parties aggrieved by any determination of a state commission concerning the scope of a carrier's duties under the 1996 Act, including determinations that involve the interpretation and enforcement of interconnection agreements. But on the assumption, for purposes of this case, that § 252(e)(6) does not reach such determinations, the proper conclusion is that judicial review is

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[11] Because defendants in the district court included state officers, this case also presents the question whether "the relief sought against the officer is not, in substance, sought against the sovereign." *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952). This Court, however, limited its grant in this case to Question 2 presented by each petition for a writ of certiorari, thereby omitting the question "[w]hether the *Ex parte Young* doctrine permits an action against the members of a state public utility commission in their official capacity to enjoin ongoing violations of federal law in their performance of federal regulatory functions." No. 00-1531 Pet. i. Verizon therefore will not discuss the *Ex parte Young* issue in this brief. Instead, Verizon (along with two others) has filed a brief as *amici curiae* in No. 00-878, where it will explain that the relief sought here — an injunction against enforcement of an unlawful adjudicatory order — falls squarely within the rule of *Ex parte Young*. Even if the Court were to hold (in No. 00-878) that *Ex parte Young* does not permit an action against the state commissioners, the Court would still have to vacate the Fourth Circuit's judgment and remand for consideration of the question whether Verizon's suit could proceed against the private party defendants. The Fourth Circuit itself suggested that an action for review of the PSC's ruling might proceed without the presence of the PSC or its commissioners. *See* Pet. App. 15a. This "uncertainty surrounding the indispensable-party issue" (*id.*) would have to be resolved before Verizon's case could be dismissed.

nonetheless appropriate under the district court's general federal-question jurisdiction.

The "strong presumption" is that, when Congress delegates power to an executive agency, "Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. As the Court has explained, "[w]hen . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Stark v. Wickard*, 321 U.S. at 309 (footnote omitted). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141.

There is no such evidence here. Contrary to the Fourth Circuit's understanding, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Id.* (internal quotation marks omitted).

In *Bowen*, for example, respondents had filed an action challenging the validity of a Medicare regulation on statutory and constitutional grounds. The government argued that Congress had "forbidden judicial review of all questions affecting the amount of benefits." 476 U.S. at 669. But, the Court held, the fact that Congress had "carefully detail[ed] the forum and limits of review" concerning determinations of the *amount* of benefits simply "does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations*

themselves." *Id.* at 675. Accordingly, all eight participating Justices agreed that the "presumption" that Congress "expects the courts to grant relief when an executive agency violates [its statutory commands]" controlled the case. *Id.* at 681.

Stark v. Wickard likewise supports jurisdiction here. The statute at issue included several specific judicial review provisions, none of which applied to the petitioners' challenge. 321 U.S. at 307-08. Far from reading these judicial review provisions as exclusive, the Court interpreted them as evidencing the "recognition by Congress of the applicability of judicial review in this field," a reading that militated *against* an interpretation of the statute that would "bar[] from the courts an otherwise justiciable issue." *Id.* at 309.

In the Fourth Circuit's view, the absence of a specific provision in the 1996 Act authorizing federal court review for state commission determinations (other than an initial approval or rejection) indicated that Congress intended state court review under state statute to be a party's sole remedy when such a determination violates federal law. *See* Pet. App. 35a. But there is nothing in the statutory language to support such an inference. On the contrary, the 1996 Act's sole mention of state courts is in a provision specifically *withdrawing* the authority of state courts to hear cases that arise out of state commission determinations under the 1996 Act. *See* 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). Even assuming for purposes of this case that § 252(e)(4) and (e)(6) do not reach the determination at issue here, the fact that Congress specifically designated federal courts as the *exclusive* forum for review in certain situations cannot support an inference that Congress intended to withdraw federal jurisdiction in other situations.

That conclusion is reinforced because Congress has demonstrated in other contexts that, when it wants to withdraw federal jurisdiction and designate state courts as the exclusive forum for reviewing administrative determinations under a federal statute, it plainly knows how to do so. For example, the Public Utility Regulatory Policies Act of 1978 contains a provision specifically limiting federal court jurisdiction except in designated circumstances. *See* 16 U.S.C. § 2633(a) ("[n]otwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of subchapter I or II of this chapter or of this subchapter" with specific exceptions). Likewise, the Trade Act of 1974 provides that "[a] determination by a cooperating State agency with respect to entitlement to program benefits . . . is subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." 19 U.S.C. § 2311(d); *see International Union, United Automobile Workers v. Brock*, 477 U.S. 274, 293 (1986) (White, J., dissenting) ("Congress thus expressed the intent that . . . the agency and state courts shall have exclusive jurisdiction").

The absence of a comparable provision in this statute is significant for two reasons. First, that Congress has included such provisions in other statutes reveals its understanding that, in the absence of limiting language, federal court jurisdiction extends to any determination that a state agency makes in its administration of a federal statute; otherwise, such provisions would be surplusage. Second, the fact that Congress chose *not* to include such a provision here indicates that Congress intended federal courts to exercise their subject matter jurisdiction in this area to the fullest extent.

Moreover, even if a state has an applicable procedure for judicial review, that says nothing about whether the presence of state jurisdiction should be read to foreclose review in federal court. The Court made this point in *Smyth v. Ames*, 169 U.S. 466 (1898), in which a railroad had brought an action to enjoin the state board of transportation (among others) from enforcing a railroad rate that was said to be unconstitutional. *See id.* at 469-70. The defendants argued that federal jurisdiction was not available because the plaintiffs had an adequate remedy under state law. *See id.* at 478. The Court rejected the argument: "One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." *Id.* When a plaintiff seeks review of state agency action on the ground that it violates federal law, "if it prefers to entrust the final decision to the Courts of the United States rather than to those of the State [it] has a right to do so." *Railroad & Warehouse Comm'n v. Duluth Street Ry.*, 273 U.S. 625, 628 (1927); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (noting that the doctrine of *Ex parte Young* has been applied to authorize federal jurisdiction "[e]ven if there is a prompt and effective remedy in a state forum") (alteration in original; internal quotation marks omitted).

Indeed, in the circumstances presented here, even if Verizon has pursued a *cause of action* under state law, the district court had subject matter *jurisdiction*, because Verizon's "complaint established that its right to relief . . . requires resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). As

noted above, there can be no question that the underlying claims of right in Verizon's suit are federal — including the significance of § 252(a)(1) and the duties imposed under the parties' 1996 Act interconnection agreement.[12] Accordingly, Verizon's claims "'arise under' the laws of the United States" and "unquestionably" present a federal question under § 1331; the suit may therefore be brought in federal court. *City of Chicago*, 522 U.S. at 164.

B. The *Rooker-Feldman* Doctrine Does Not Bar Federal Judicial Review of State Administrative Action

Contrary to the Fourth Circuit's view, the *Rooker-Feldman* doctrine does not apply to this case. The court of appeals acknowledged that "strict application of the doctrine requires a final judgment from State courts," but it nonetheless believed that "the federal intrusion into State affairs is not any less when the judgment issues from a State quasi-judicial body." Pet. App. 50a. As this Court made clear in *City of Chicago*, however, it is entirely appropriate — indeed, commonplace — for federal courts to review state administrative action in the first instance, even if a state procedure for review is available.

City of Chicago involved an adjudication by Chicago's Historical and Architectural Landmarks Commission that two of respondent's buildings qualified for landmark status under the applicable ordinance. 522 U.S. at 159-60. Respondents filed an action for judicial review under the state administrative review law, alleging that the statute — both on its face and as applied — was unconstitutional and that the proceedings

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[12] In addition, because the parties' obligations precisely track obligations imposed under § 251(b)(5), Verizon's cause of action necessarily requires the resolution of the obligations imposed under that federal provision.

also had violated the constitution. *Id.* at 160. The complaint also sought relief on purely state-law grounds. *Id.* Petitioners removed the action on the basis of federal-question jurisdiction, and the district court denied a motion to remand. *Id.* at 161. The Seventh Circuit reversed, holding that a federal court lacked jurisdiction to engage in deferential review of state agency action. *Id.* at 162 (noting that the Seventh Circuit had determined that "a proceeding to review state administrative action under a deferential standard is not a 'civil action'").

This Court reversed. First, the Court held that, even though respondent had invoked a state cause of action, its claims arose under federal law because "a 'right or immunity created by the Constitution or laws of the United States [was] an element, and an essential one, of the plaintiff's cause of action.'" *Id.* at 164 (quoting *Gully*, 299 U.S. at 112). Second, the Court held that the district court had supplemental jurisdiction over any claims that arose under state law (*id.* at 165-66) — for example, the state-law claim that the Chicago Landmarks Commission had misapplied its ordinances.

The Court rejected the argument that the federal court was deprived of jurisdiction because an action for on-the-record review was not a "civil action[]" within the "original jurisdiction" of the district court for purposes of the removal statute: it held that, even if its "state claims" were not civil actions, its federal claims were. Just as important for present purposes, the Court made clear that an action to secure "judicial review of state administrative decisions" is "generally encompasse[d]" within federal subject matter jurisdiction under § 1331. *Id.* at 169. As the Court noted, "district courts routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *Id.* at 171. ***See also Shields***,

305 U.S. at 184 ("respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the [Interstate Commerce] Commission's determination").

City of Chicago makes clear that *Rooker-Feldman* is inapplicable to the circumstances presented here. That doctrine applies to situations where a state *court* renders a final judgment; in such circumstances, Congress intends that the sole avenue into federal court should be a petition for certiorari invoking the explicit authority of the Supreme Court to review the judgments of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). But § 1257 makes no mention of administrative agencies, and *City of Chicago* itself involved administrative determinations made pursuant to established standards; both the determinations and the standards were said to violate the federal constitution. Whether or not administrative action involves an adjudicative function, and whether or not such action is subject to review in state court, a federal forum is available for claims that such administrative action has violated federal law.

The conclusion that the exercise of federal jurisdiction is appropriate is even clearer in this case than it was in *City of Chicago* for two reasons. First, the agency action here was undertaken in the exercise of authority granted under *federal* law. Contrary to the Fourth Circuit's understanding, nothing in Maryland law authorizes the PSC to hear a complaint against Verizon alleging a violation of *federal* law. On the contrary, the provision of Maryland law on which the Fourth Circuit relied makes clear that a person may file a complaint only to "allege a violation *of this article*" — *i.e.*, the state statute, not the 1996 Act. Md. Code Ann., Pub. Util. Cos. § 3-102(a)(2) (1998) (emphasis added). Nothing in the complaint underlying this case alleged that Verizon had violated any

provision of the Maryland Public Utility Companies law; instead, the allegation was that Verizon had violated the 1996 Act and the parties' 1996 Act interconnection agreement.

Accordingly, it was only to the extent that federal law authorized the administrative complaints at issue here that preliminary resort to the PSC was appropriate. As every other federal court to consider the question has agreed, a state commission's authority to consider such complaints derives from its authority under § 252 to arbitrate and approve interconnection agreements. *See Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252"); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000) ("[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements"), *cert. denied*, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("[T]he Act's grant to the state commissions of plenary authority to approve or disapprove . . . interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.").

The conclusion that the delegation of federal authority to state commissions includes the power to interpret and enforce interconnection agreements reflects the settled principle that the agency entrusted with making the policy judgments inherent in overseeing the approval of a federal tariff is likewise the exclusive original tribunal for claims that require construction of disputed terms. *United States v. Western Pac. R.R.*,

352 U.S. 59, 65-66 (1956); *Great Northern*, 259 U.S. at 291. In this case, the issue presented — the meaning of the interconnection agreement provision requiring reciprocal compensation "as . . . required by the Act" and limiting such compensation to "local traffic" as specifically defined in keeping with FCC regulations — involved the type of issue that must be resolved in the first instance by the agency with "the law-making power over certain aspects of commercial relations." *Western Pac.*, 352 U.S. at 65 (internal quotation marks omitted). The courts have therefore correctly concluded that the type of determination at issue here is one made under the authority delegated by federal law. Accordingly, the PSC was acting as a *federal* agency, not merely as a state agency, because it was exercising a power delegated by Congress, not the state. The rule of *Califano v. Sanders*, 430 U.S. 99 (1977), that "federal district courts may engage in on-the-record, substantial evidence review of federal agency actions under § 1331" (*City of Chicago*, 522 U.S. at 183 (Ginsburg, J., dissenting)) fully applies here.

Second, unlike *City of Chicago*, where the plaintiff had raised both federal and state-law challenges to state administrative action taken under state law, this case raises *no* issue of state law. The administrative scheme at issue here is exclusively federal, and the obligations imposed by the interconnection agreements at issue are likewise exclusively federal. *See supra* at 20-29. Accordingly, the only legal issues presented are matters of federal law. Forcing Verizon to litigate these issues in state court — whether or not the state court properly has jurisdiction — "would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts." *England v. Louisiana State Board of Med. Examiners*, 375 U.S. 411, 415 (1964).

For the same reason, the principles underlying abstention doctrine could not support a federal court's refusal to exercise jurisdiction in this case. Because the issues here are ones purely of federal law, this case "does *not* demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989). In such circumstances, the district court must exercise the federal jurisdiction conferred by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

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IN THE

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VERIZON MARYLAND INC., and
UNITED STATES OF AMERICA,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federal district court has subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents MCI WORLDCOM, Inc., and MCImetro Access Transmission Services LLC, state as follows:

MCI WORLDCOM, Inc. is now known as WorldCom, Inc. WorldCom, Inc. is a Georgia corporation that, through its wholly owned subsidiaries, provides local, long distance, and other telecommunications services domestically and internationally. WorldCom, Inc. is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT." WorldCom, Inc. has no parent corporations. No publicly held company owns 10 percent or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

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United States Court of Appeals
for the Fourth Circuit**

BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC IN SUPPORT OF PETITIONERS

Respondents MCI WORLDCOM, Inc., and MCImetro Access Transmission Services LLC (collectively "WorldCom"), through undersigned counsel, submit this brief in support of petitioners, seeking reversal of the decision of the United States Court of Appeals for the Fourth Circuit in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), Pet. App. 1a-72a. As we show, the Fourth Circuit erroneously held that federal courts lack subject matter jurisdiction under 28 U.S.C. § 1331 to entertain federal law challenges to state commission determinations enforcing pre-

existing interconnection agreements between competing local carriers.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6) to review the determination of the Public Service Commission of Maryland ("PSC") for compliance with federal law.

The judgment of the court of appeals was entered on February 14, 2001. Petitions for writs of certiorari were timely filed on April 5, 2001 (by Verizon Maryland Inc.), and on May 15, 2001 (by the United States). The petitions were granted, and the cases consolidated, on June 25, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Verizon Maryland Inc. ("Verizon") filed this action in federal district court against WorldCom and a number of other competing carriers, the PSC, and individual PSC Commissioners ("Commissioners"), challenging the PSC's June 11, 1999, Order enforcing the "interconnection agreement" entered into between Verizon and MFS Intelenet of Maryland ("MFS"), pursuant to the Telecommunications Act of 1996 ("1996 Act" or "Act"), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*[1] Verizon's complaint alleged, *inter alia*, that the PSC's Order violates the 1996 Act

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[1] MFS later was acquired by WorldCom. Verizon was formerly known as Bell Atlantic Maryland, Inc., the name which appears in the decision of the court below.

and various implementing regulations of the Federal Communications Commission ("FCC").

1. The Statutory Scheme

The 1996 Act fundamentally changed the regulation of the local telephone industry throughout the country. In the Communications Act of 1934, Congress left regulation of intrastate telecommunications primarily to the states. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The states, in turn, historically granted exclusive franchises to incumbent local telephone companies like Verizon. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); H.R. Rep. No. 104-204, at 49 (1995).

Congress enacted the 1996 Act for the express purpose of ending this monopoly regime and promoting a competitive market for local telephone service. *See AT&T Corp.*, 525 U.S. at 371. Toward that end, the 1996 Act partially supplants state regulation and imposes a new set of substantive federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *Id.* at 371-73. Congress thus altered the prior balance of federal and state regulatory authority in the area of local telecommunications. *Id.* at 371.

Under the Act, a new entrant that wishes to enter a local telephone market must contact the incumbent carrier to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If the two carriers cannot reach an agreement, they must ask the governing state commission to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). The results of the negotiation and arbitration process are memorialized in an "interconnection agreement" between the

carriers, which is then submitted for approval to the state commission. *Id.* § 252(e).

Although the Act supplies minimum requirements that state commissions must follow in arbitrating provisions about which the parties cannot reach a negotiated agreement, parties may negotiate terms "without regard" to these requirements. *Id.* § 252(a)(1). When parties voluntarily agree to terms, a state commission may reject the terms only if they are discriminatory or against the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A); *see also AT&T Corp.*, 525 U.S. at 371-73.

Thus, in the spirit of cooperative federalism, Congress vested the FCC with the primary authority to implement the federal standards created by the Act, *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. §§ 201(b), 251(d)(1), while at the same time, carving out a new, voluntary role for states in overseeing interconnection agreements. The Act in no way requires state commissions to help implement the new federal scheme. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6); *see also AT&T Corp.*, 525 U.S. at 378 n.6 ("there is no doubt . . . that if the federal courts believe a state

commission is not regulating in accordance with federal policy they may bring it to heel").[2]

2. Nature of the Dispute

This case concerns one aspect of the parties' interconnection agreement, known as "reciprocal compensation," which is the payment that a local carrier receives for completing a call for another local carrier. With local competition, customers of one local carrier will call customers of another. Carriers must therefore assist each other in delivering calls. When a customer of one local carrier makes a call to a customer of another local carrier, only the caller pays its carrier for the telephone services, leaving the other carrier uncompensated. The caller's local carrier therefore must compensate the other carrier whose facilities are used to complete the call. *See* 47 U.S.C. § 251(b)(5); *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 2-3 (D.C. Cir. 2000).

Verizon and MFS agreed in their negotiated interconnection agreement to pay each other reciprocal compensation for the exchange of "Local Traffic." Pet. App. 95a. Local Traffic is defined in the parties' interconnection agreement as a call within a given local calling area, or expanded area service ("EAS") area, to another local telephone number. Pet. App. 95a. The dispute in this case was whether calls by local customers of one carrier that are routed by another carrier to its local customers operating as "Internet Service Providers" ("ISPs") constitute "Local Traffic" as defined in the interconnection agreement.

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[2] If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *See* 28 U.S.C. § 2342(1).

The parties' interconnection agreement was approved by the PSC on October 9, 1996. In April 1997, after operating under the approved agreement for over six months, Verizon announced that it was unilaterally stopping reciprocal compensation payments for calls to local ISPs, claiming for the first time that such calls are not "Local Traffic." Pet. App. 94a. In response, MFS filed a complaint with the PSC to enforce the agreement by requiring Verizon to resume payments of reciprocal compensation for ISP calls. *Id.* On September 11, 1997, the PSC issued a letter order in which it ruled that the plain language of the agreement mandated payment of reciprocal compensation for calls to ISPs. *Id.* at 95a-97a.[3] Verizon appealed that order under Maryland state law to the Montgomery County Circuit Court, which affirmed the order in its entirety. Verizon did not file suit in federal court. Compl. ¶ 34.[4]

On February 26, 1999, the FCC issued a Declaratory Ruling (the "*ISP Order*") in which it held that a carrier's right to reciprocal compensation for calls to ISPs is governed by the terms of the parties' interconnection agreement. Pet. App. 96a-97a.[5] The FCC found that parties are "bound by their existing

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[3] On December 2, 1998, Sprint Communications Company, LP ("Sprint") filed a complaint with the PSC alleging that Verizon unlawfully refused to enter into an interconnection agreement unless it stated that calls to ISPs are not local and not subject to reciprocal compensation. Pet. App. 96a. On February 9, 1999, the PSC ruled that calls to ISPs are in fact "local in nature" and subject to reciprocal compensation. *Id.*

[4] *See* Civil Action No. 178260, Docket Entry No. 36 (Cir. Ct. Montgomery County, Md. March 26, 1998). Compl. ¶ 34.

[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-*
(continued...)

interconnection agreements, as interpreted by state commissions," including those that require payment of reciprocal compensation for calls to ISPs. *Id.* at 97a (internal quotation and citation omitted). The FCC further held that there is "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." *ISP Order* ¶ 21. The FCC also described several factors that state commissions might consider in determining whether parties had agreed in their interconnection agreements to pay reciprocal compensation for calls to ISPs, including the fact that for years, both the FCC and incumbent carriers traditionally had treated calls to ISPs as local. *Id.* ¶¶ 23-24; Pet. App. 97a-99a. The FCC concluded, however, (i) that calls to ISPs are "jurisdictionally mixed," (ii) that a substantial portion of ISP-bound traffic is interstate for jurisdictional purposes, and (iii) that the Act did not mandate that reciprocal compensation be paid for these calls.[6] *ISP Order* ¶¶ 1, 22; Pet. App. 96a.

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[5] (...continued)
Bound Traffic, 14 F.C.C.R. 3689 (1999) ("*ISP Order*"), *vacated*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

[6] At WorldCom's request, the D.C. Circuit vacated that order for want of reasoned decision making. *Bell Atlantic Tel. Cos.*, 206 F.3d at 9. The FCC recently has concluded that the Act does not require reciprocal compensation for these calls, established prospectively a new federal compensation regime for this traffic, and determined that its new order does not affect preexisting contract obligations or state commission decisions like those at issue in this case. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. Apr. 27, 2001). WorldCom and other parties have appealed that decision to the D.C. Circuit. *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. filed May 17, 2001).

On March 3, 1999, Verizon petitioned the PSC for an order declaring that the *ISP Order* "conclusively establishe[d]" that calls to ISPs are not local and not subject to reciprocal compensation under the terms of its various interconnection agreements with MFS and others. *Petition for Declaratory Order that Internet Traffic is not "Local" Traffic Subject to Reciprocal Compensation*, No. 8731, at 9 (PSC of Md. filed Mar. 3, 1999); Pet. App. 91a. On June 11, 1999, the PSC denied Verizon's petition and rejected its contention that the FCC's *ISP Order* dictated whether or not reciprocal compensation was owed for calls to ISPs. Pet. App. 99a. The PSC thus affirmed its earlier determination that Verizon owed MFS reciprocal compensation for calls to ISPs under the terms of parties' interconnection agreement. Pet. App. 107a. The PSC also required Verizon to pay reciprocal compensation for calls to ISPs, on an interim basis, to any carrier with whom Verizon did not have an interconnection agreement specifying that such payments were not required. *Id.*[7]

3. The District Court Proceedings

On July 14, 1999, Verizon filed suit in the United States District Court for the District of Maryland against the PSC, the individual PSC Commissioners (collectively, the "PSC Defendants"), and various competitors, including WorldCom and MFS, to challenge the PSC's determination. Verizon sought declaratory and injunctive relief under 47 U.S.C. § 252(e)(6). Verizon asserted jurisdiction under both § 252(e)(6) and 28 U.S.C. § 1331. Compl. ¶ 21. Both counts of the complaint alleged violations of federal law. Compl. ¶¶ 40, 42. In Count One, Verizon alleged that the PSC's

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[7] This was based in part on the PSC's determination that, unless the parties have negotiated a contrary arrangement, for the PSC "[t]o fail to provide for any compensation would violate the 1996 Act." Pet. App. 106a.

determination that Verizon owed reciprocal compensation under its agreement with MFS violated the 1996 Act and the FCC's *ISP Order* as well as the terms of the agreement itself. Compl. ¶¶ 1, 5-7, 40. In Count Two, Verizon alleged that the PSC's decision to require reciprocal compensation where the parties lacked an agreement also violated the 1996 Act and the FCC's *ISP Order*. Compl. ¶¶ 1, 5-7, 42.[8] Numerous allegations relating to both counts described Verizon's view of the federal requirements. Compl. ¶¶ 3, 4, 5, 7, 25, 31-32, 37-38.

After briefing by the parties, the District Court granted the PSC Defendants' motion to dismiss on the grounds that those Defendants were immune from suit under the Eleventh Amendment and that the case could not proceed under Federal Rule of Civil Procedure 19(b) because they were indispensable parties. Pet. App. 77a-86a. The district court also held that Count Two of Verizon's complaint was unripe. Pet. App. 86a-90a. The court refused to address the PSC Defendants' argument that the court lacked subject matter jurisdiction under section 252(e)(6), Pet. App. 76a, and noted that it was not "willing to recognize an independent federal cause of action under § 1331," Pet. App. 90a.

4. The Fourth Circuit's Decision

A divided panel of the United States Court of Appeals for the Fourth Circuit affirmed. *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), Pet. App. 1a-72a. Parting ways with every federal court of appeals to

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[8] Verizon also alleged that both determinations were arbitrary and capricious and not the result of reasoned decision making. Compl. ¶¶ 40, 42.

have addressed the issue, the court first held that the PSC Defendants were immune from suit in federal court because (1) the PSC had not waived its Eleventh Amendment immunity by voluntarily participating in the administration of interconnection agreements under the 1996 Act and (2) suit against the individual commissioners could not proceed under *Ex parte Young*. Pet. App. 8a-30a. In ruling on the immunity issues, the court repeatedly concluded that the PSC Defendants were not indispensable parties to a suit for review of a PSC determination under the 1996 Act. The court then held that it lacked subject matter jurisdiction under section 252(e)(6) because that section granted federal courts jurisdiction to review only state commission determinations approving or rejecting interconnection agreements, not determinations enforcing previously approved agreements. Pet. App. 30a-47a.

Finally, the court held that it also lacked subject matter jurisdiction under 28 U.S.C. § 1331. Pet. App. 47a-50a. The court rested this conclusion on three grounds. First, it looked to section 601(c) of the Act, which provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Pub. L. No. 104-104, § 601(c), *reprinted at* 47 U.S.C. § 152 note; Pet. App. 48a. The Fourth Circuit, however, read section 601(c) as preserving only state, not federal, law. Pet. App. 48a (stating that section 601(c) "states that the Act is not to be construed 'to modify, impair or supersede . . . state, or local law *unless expressly so provided*'") (emphasis and ellipsis omitting the word "federal" supplied by the court). Pet. App. 39a. Combining this reading of section 601(c) with its narrow construction of section 252(e)(6), the court concluded that Congress must have intended section 252(e)(6) as a limit on the federal courts' jurisdiction under section 1331. Pet. App. 48a. According to the court, therefore, it would be "nonsensical" to conclude that

Congress intended federal questions not encompassed by section 252(e)(6) to be heard in federal court. *Id.* Second, the court reasoned that the federal interest in federal claims arising out of interconnection agreements under the 1996 Act was not "sufficiently substantial . . . to confer jurisdiction under 28 U.S.C. § 1331." Pet. App. 48a-50a. Third, the court intimated that under the principles of the *Rooker-Feldman* doctrine, review in federal court under section 1331 of a state commission's determination interpreting and enforcing an interconnection agreement under the 1996 Act could effectuate an impermissible "federal intrusion into State affairs."[9] Pet. App. 50a.

In a strongly worded dissent, Judge King disagreed with every one of the majority's holdings, characterizing the majority opinion as being in "defiance" of this Court's clear admonitions and unnecessarily injecting "equivocation" and "chaos" "where once there was certitude." Pet. App. 52a. Judge King rejected the majority's "narrow construction" of section 252(e)(6) and reasoned, in accord with every other court of appeals to have reached the issue, that the grant of authority in section 252(e)(6) "necessarily includes the power to enforce the interconnection agreement." Pet. App. 55a (internal quotation and citation omitted). In addition, Judge King concluded that because two counts in Verizon's complaint expressly alleged violations of federal law, its complaint unquestionably arose under federal law. Pet. App. 56a-57a.

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[9] On the same day, the Fourth Circuit issued a companion decision in a case involving an ISP dispute in North Carolina. *BellSouth Telecommunications, Inc. v. North Carolina Utils. Comm'n*, 240 F.3d 270 (4th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3740 (U.S. May 14, 2001) (No. 00-1699). Both the issues and the court's analysis in that case were identical in all material respects to the issues and the decision in the *Bell Atlantic* case below.

Judge King summarized his disagreement with the majority as follows:

> Unfortunately, by its holding that federal court jurisdiction is limited to reviewing the approval and rejection of interconnection agreements by State commissions, the majority will create a confusing and unworkable scheme of federal and state review that is bound to produce absurd results. First, as the Tenth Circuit explained:
>
> A rule that restricted a district court's jurisdiction to review of a state commission's approval or rejection of an interconnection agreement would lead to results that Congress could not have intended. Under such a rule, certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved. *Brooks Fiber Communications*, 235 F.3d at 497.
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> Second, the majority's holding – if imprudently followed across the country – could result in fifty states reaching fifty different conclusions about the interpretation of an important federal statute. And, finally, the majority's position undermines, and renders entirely meaningless, the recent explicit statement of Justice Scalia that "there is no doubt . . . that if the federal courts believe a state

> commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6.

Pet App. 57a-58a.[10]

Both Verizon and the United States filed petitions for certiorari, presenting the same four questions: (i) whether a state commission decision enforcing and interpreting an interconnection agreement is a determination under section 252(e)(6); (ii) whether federal courts have jurisdiction over such decisions pursuant to 28 U.S.C. § 1331; (iii) whether the PSC waived its immunity by voluntarily participating in the administration of the Act; and (iv) whether suit against the Commissioners was proper under *Ex parte Young*. Pet. of United States at I; Pet. of Verizon at i. On June 25, 2001, the Court granted both petitions, limited to the second question presented: Whether a federal district court has subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act.[11] *See* 121 S. Ct. 2548 (2001). The cases were then consolidated by the same order. *Id.*

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[10] Judge King also rejected the majority's conclusions that the PSC Defendants were entitled to Eleventh Amendment immunity and that suit could not be maintained under the doctrine of *Ex parte Young*. Pet. App. 58a-72a.

[11] *See* Pet. of United States at I. Verizon, in its petition, formulated the question as follows: "Whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996." *See* Pet. of Verizon at i.

This case is closely related to *Mathias v. WorldCom Technologies, Inc.*, No. 00-878, which also is currently before the Court. There, on review of a Seventh Circuit decision arising out of similar facts, the Court is considering issues also decided below by the Fourth Circuit – including whether section 252(e)(6) of the 1996 Act provides federal jurisdiction for review of state commission determinations interpreting or enforcing an interconnection agreement, whether the Eleventh Amendment precludes suit against state commissioners to remedy alleged violations of federal law, and whether suit against the individual state commissioners may proceed under *Ex parte Young*. *See Mathias v. WorldCom Technologies, Inc.*, 121 S. Ct. 1224 (2001). The Fourth Circuit in this case and the Seventh Circuit in *Mathias* reached opposite conclusions on those questions.

SUMMARY OF THE ARGUMENT

In this case, the Court has granted review to consider only the question whether, if section 252(e)(6) does not apply, federal courts have general federal question jurisdiction under 28 U.S.C. § 1331 to address claims by carriers that the decision of a state commission interpreting or enforcing an interconnection agreement violates federal law. As we explain in our *Mathias* brief, actions filed by carriers seeking review of state commission decisions interpreting or enforcing interconnection agreements may be brought under section 252(e)(6) of the 1996 Act to determine compliance with federal law. If this Court holds in *Mathias* that section 252(e)(6) grants federal court jurisdiction over enforcement actions such as this, the question presented here will be moot.

Regardless of whether section 252(e)(6) is interpreted as an independent grant of jurisdiction, however, section 1331 unquestionably provides general federal question jurisdiction in these circumstances. While WorldCom fully supports the Fourth Circuit's conclusion that Verizon's substantive federal claims are without merit, those claims were not wholly frivolous or insubstantial at the time they were raised and, therefore, "arise under" federal law. Bedrock principles of federal jurisprudence establish that federal courts have general federal question jurisdiction under section 1331 to address non-frivolous claims that state officials have violated federal law. Here, the Fourth Circuit erred by *first* reaching the ultimate conclusion on the merits (that Verizon's federal claims lacked merit), and *then* working back from that conclusion to determine that the court therefore lacked jurisdiction over Verizon's complaint. That analysis is precisely backward.

Indeed, given the general grant of federal question jurisdiction in section 1331, the fundamental question presented in both this case and *Mathias* is whether anything in section 252 *withdraws* federal question jurisdiction as to this one category of federal claims. The answer to that question is clear. Nothing in section 252(e)(6) – or any other provision of the 1996 Act – suggests a congressional intent to *bar* federal jurisdiction over claims that state commission enforcement determinations violate the Act. General federal question jurisdiction under section 1331 therefore exists in this case, as it did in *Mathias*.

ARGUMENT

I. FEDERAL COURTS HAVE GENERAL FEDERAL QUESTION JURISDICTION TO DETERMINE WHETHER STATE COMMISSION "ENFORCEMENT" DETERMINATIONS VIOLATE THE 1996 ACT.

The face of Verizon's complaint establishes that Verizon alleged claims turning on federal law that are not wholly insubstantial or frivolous. The district court therefore had subject matter jurisdiction to consider them, as nothing in the 1996 Act withdraws general federal question jurisdiction over claims that state officials have violated federal law.

A. Verizon Raised Federal Questions That Federal Courts Have Jurisdiction to Answer under 28 U.S.C. § 1331.

Regardless of how the Court rules in *Mathias* on the scope of section 252(e)(6), the district court plainly had jurisdiction under section 1331 to consider Verizon's federal claims. A civil action "arises under" federal law for purposes of section 1331 when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997).

To determine the existence of federal question jurisdiction, the court "must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the

Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946). As this Court recently reaffirmed:

> [T]he district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. at 685).

As with Ameritech's complaint in *Mathias*, Verizon's complaint here easily satisfies these jurisdictional requirements. As noted, Verizon brought two counts in its complaint, both of which directly identify alleged violations of federal law. In each count, Verizon "claims a right to recover under the . . . laws of the United States. *Bell v. Hood*, 327 U.S. at 681. "[T]he right of the petitioners to recover" thus depends upon the construction of the "laws of the United States." *Steel Co.*, 523 U.S. at 89. In Count I, Verizon alleged that "[t]he PSC's decision . . . is inconsistent with federal law[.]" Compl. ¶ 40. In Count II, Verizon again alleged that "[t]he PSC's decision . . . violates federal law[.]" Compl. ¶ 42. In factual and legal allegations relating to both counts, Verizon alleged:

- The 1996 Act mandates specific kinds of reciprocal compensation duties. Compl. ¶¶ 3, 25.

- Federal law permits reciprocal compensation only for local calls. Compl. ¶ 4.

- Under FCC precedent, calls to ISPs cannot be considered local. Compl. ¶¶ 4, 25, 31-32, 35.

- The PSC "failed to apply the FCC's decisions." Compl. ¶ 5.

- The PSC "misread the relevant FCC order." Compl. ¶¶ 6; *see also id.* ¶¶ 37-39.

- Verizon is "entitled to a declaration that the PSC's determinations are unlawful." Compl. ¶ 7.

Each count thus required the courts below to consider federal law as an "essential element" of Ameritech's claims. Jurisdiction therefore exists under section 1331. As this Court explained when addressing the scope of section 1331, "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160-62 (1908)).

Of course, federal claims challenging state commission determinations as contrary to federal law need not be *meritorious* in order to fall within the jurisdiction of the federal courts. It is "well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. at 682; *accord Jackson Transit Auth. v. Local Div. 1285*, 457 U.S. 15, 21 n.6 (1982). The "absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (emphasis in original). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of

merit as not to involve a federal controversy." *Id.* (internal quotations and citations omitted).

The Fourth Circuit nevertheless failed to heed this critical distinction. Without actually holding as much, the Fourth Circuit determined that under the current state of the law, Verizon's federal claims – that state officials had violated federal law in orders requiring reciprocal compensation for calls to ISPs – ultimately had no merit. *See* Pet. App. 23a-29a, 47a-50a. To be sure, WorldCom agrees with the Fourth Circuit that Verizon's federal claims lacked merit. *See, e.g., Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475 (5th Cir. 2000); *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000). That, however, is irrelevant to the jurisdictional analysis. The fact remains that Verizon raised non-frivolous claims requiring the court to construe and apply federal law. Accordingly, these cases properly fell within the court's subject matter jurisdiction, as this Court's precedent confirms. *Bell v. Hood*, 327 U.S. at 682; *accord Jackson Transit*, 457 U.S. at 21 n.6.

The Fourth Circuit relied on this Court's decision in *Jackson Transit* to defend its holding, describing this case and *Jackson Transit* as "closely analogous." Pet. App. 49a. In *Jackson Transit*, a labor union argued, similar to Verizon's arguments below, that collective bargaining agreements were governed by federal law because a federal statute required local governments to execute those agreements. 457 U.S. at 20-21. This Court disagreed, holding that the interpretation of contractual terms raises a question of federal law only if the statute at issue demonstrates that Congress intended that "the

rights and duties contained in [such] contracts be federal in nature." *Id.* at 23.

This case *is* closely analogous to *Jackson Transit*. In both cases, parties incorrectly argued that federal law governed the interpretation of contracts merely because federal law required the parties to enter into the contracts. Pet. App. 49a. Responding to Verizon's argument that interconnection agreements must be interpreted under federal law because the Act requires their formation, the Fourth Circuit correctly held that "[i]t is a question of State law, however, whether the interconnection agreement at issue in this case includes a dynamic incorporation of statutory interpretation." Pet. App. 27a. Citing *Jackson Transit*, 457 U.S. at 29, the Fourth Circuit also correctly concluded that merely because Congress required parties to enter into a contract does not render interpretation of that contract a federal question. Pet. App. 49a. As the Fourth Circuit noted, the Act permits parties to negotiate and voluntarily agree upon interconnection terms, as occurred here. Pet. App. 27a, 40a. And nothing in the Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement into a federal question. To the contrary, Congress expressly preserved state law that is consistent with the Act. It declared that "this Act . . . shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c)(1), *reprinted at* 47 U.S.C. § 152 note. The Act additionally provides that states may impose state law requirements in interconnection agreements and that pro-competitive state law requirements that do not conflict with the Act are not preempted. 47 U.S.C. §§ 251(d)(3); 252(e)(3); 261(c).

But contrary to the Fourth Circuit's conclusion on jurisdiction, *Jackson Transit* actually demonstrates why the district court *did* have jurisdiction here. Even though the Court in *Jackson Transit* rejected the union's claim that federal law governed interpretation of the contracts – much as Verizon's similar claims here are without merit – the Court affirmed the Sixth Circuit's conclusion that the federal courts had jurisdiction over the union's complaint. As the Court explained:

> Thus, we agree with the Court of Appeals that, strictly speaking, the District Court had jurisdiction under 28 U.S.C. § 1331 to hear the union's suit. Under *Bell v. Hood*, 327 U.S. 678, 681 (1946), jurisdiction exists if the complaint is "drawn so as to claim a right to recover under the Constitution and laws of the United States." The complaint alleged a violation . . . of the subsequent collective-bargaining agreement contemplated by the Act, and prayed for relief under federal law. We do not consider the union's asserted federal claim to be "wholly insubstantial and frivolous," 327 U.S. at 682-83, so that the District Court lacked jurisdiction to entertain the union's suit. Thus, the District Court had jurisdiction for the purposes of determining whether the union stated a cause of action on which relief could be granted. *Id.* at 682.

457 U.S. at 21 n.6 (parallel citations omitted).

The identical reasoning applies here. Absent a demonstration that Verizon's claims are "wholly insubstantial and frivolous," the district court and the court of appeals had jurisdiction under section 1331 to consider them. *Id.* The

Fourth Circuit never engaged in that simple threshold analysis. Instead, it concluded that Congress intended for section 252(e)(6) somehow to withdraw the general federal question jurisdiction granted under section 1331. As we show next, the Fourth Circuit was wrong.[12/]

B. Section 252(e)(6) Does Not Withdraw the District Court's General Federal Question Jurisdiction.

Section 252(e)(6) does not preclude a federal court from exercising general federal question jurisdiction in cases challenging state commission enforcement actions. First, it is far from clear that section 252(e)(6) even addresses jurisdiction. It states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251 and this section [252].

47 U.S.C. § 252(e)(6). The section does not mention "jurisdiction," and its language is just as consistent with the conclusion that Congress was simply confirming the existence of a cause of action to challenge state commission actions under the Act. *See Steel Co.*, 523 U.S. at 90-91 (even statutes

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[12] The question whether a state commission has interpreted the parties' interconnection agreement contrary to its terms arises under state law. Whether a federal court could exercise supplemental jurisdiction under 28 U.S.C. § 1367 to consider that state law question depends on whether the state commission has asserted Eleventh Amendment immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121-23 (1984).

referring to "jurisdiction" frequently do not relate to "genuine subject-matter jurisdiction").

Second, even assuming that section 252(e)(6) does relate to the district court's subject matter jurisdiction, it cannot be construed as withdrawing preexisting jurisdiction in enforcement cases. Similar to the arguments the petitioners raise in *Mathias*, the crux of the Fourth Circuit's decision is that section 252(e)(6) has nothing to do with state commission decisions enforcing interconnection agreements. It concluded that enforcement determinations simply are not among the "determinations" at issue in section 252(e)(6). Pet. App. 36a-40a.

As we explain in our *Mathias* brief, where the point is more directly at issue, we disagree with this interpretation of section 252(e)(6). *See* Br. of WorldCom, *et al.*, No. 00-878, at 22-28. Enforcement determinations by state commissions are made "under" section 252. Even if this were not the case, however, then section 252(e)(6) would at most be silent concerning jurisdiction to review enforcement determinations. Thus, under the Fourth Circuit's own view of the case, section 252 does not contain a detailed (or indeed any) remedial scheme relating to enforcement of agreements that might conceivably displace the federal question jurisdiction of the district courts under section 1331.[13] *See, e.g., Bowen v.*

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[13] Similarly, if section 252(e)(6) relates to a cause of action rather than to subject matter jurisdiction, either it gives carriers a cause of action for review of state commission enforcement determinations, or it is altogether silent concerning enforcement. In the latter case, the section would not constitute a detailed remedial scheme for enforcement that could displace a private right of action under 42 U.S.C. § 1983 or the inherent equitable authority of the federal courts to issue injunctions to enforce

(continued...)

Michigan Academy of Family Physicians, 476 U.S. 667, 673-76 (1986) (statute that expressly provides for judicial review in one class of cases does not eliminate section 1331 jurisdiction in another class of cases as to which it is silent) (superseded by statute on other grounds, when Congress amended 42 U.S.C. § 1395ff(b) (1988)).[14]

For these reasons, the Sixth Circuit in *GTE North, Inc. v. Strand*, 209 F.3d 909, 918-19 (6th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000), reached a conclusion that was precisely opposite the one the Fourth Circuit reached here. In *Strand*, GTE claimed that the Michigan commission violated federal law under the 1996 Act by requiring it to make interconnection elements available by tariff, distinct from the interconnection agreement process that the Act specifies. GTE claimed that the Act preempted that decision. The Michigan commission argued that the federal court lacked subject matter jurisdiction,

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[13] (...continued)
federal rights. In any event, federal subject matter jurisdiction would exist even if federal law were ultimately construed not to provide a cause of action here. *Steel Co.*, 523 U.S. at 89.

[14] *See also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 16 (2000) (explaining that *Michigan Academy* held that "statute's total silence" about judicial review in one class of cases "meant that, although review was not available *under § 405(g)*, the silence did not itself foreclose other forms of review, say review in a court action brought under § 1331"); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493-94 (1991) (holding that statute which expressly limits jurisdiction of federal courts with regard to specific type of case will not be construed as impairing section 1331's general grant of federal question jurisdiction with respect to closely related proceedings); *cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105-06 (1868) (holding that repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction heretofore allowed"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (holding same).

because the case did not involve a determination "under" section 252, which it asserted was the sole basis to bring claims that state officials had violated the Act. The Sixth Circuit disagreed, finding nothing in the Act supporting the argument that section 252 somehow divests federal courts of general subject matter jurisdiction under section 1331. As the Sixth Circuit explained, a contrary holding would be "antithetical to the principle that the parties injured by a governmental entity's failure to adhere to the law may seek redress in the courts." *Id.* at 919.

Third, the Act itself makes clear that it cannot be construed to limit the general reach of section 1331 by implication. Section 601 provides that "[t]his Act and the amendments made by the Act shall not be construed to modify, impair, or supersede Federal . . . law unless *expressly* so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c)(1) (emphasis added), *reprinted at* 47 U.S.C. § 152 note. Congress knows how *expressly* to limit the reach of section 1331, having done so elsewhere in the United States Code. *See, e.g.*, 42 U.S.C. § 405(h) ("[n]o action . . . shall be brought under section 1331 . . . of Title 28 to recover on any claim arising under this subchapter"). Plainly, section 252(e)(6) does not expressly limit the preexisting jurisdiction of the federal courts under section 1331.

Relying on section 601(c)'s preservation of *state* law, the Fourth Circuit concluded that Congress intended to leave review of enforcement decisions to state courts and preclude federal jurisdiction. Pet. App. 35a-40a, 47a. But the Fourth Circuit's analysis inexplicably ignores the express terms of section 601(c), which preserves both *federal and state* law, unless expressly superseded by the Act. With respect to enforcement cases, the Act expressly supersedes neither federal

court jurisdiction under section 1331 nor state court jurisdiction under applicable state law. Accordingly, section 601(c) preserves independent jurisdictional bases under federal law (such as section 1331) as well as state law. The Fourth Circuit's inexplicable reading of section 601(c) to preserve only *state* law jurisdiction contradicts the plain language of that section.

Fourth, where Congress intended the Act to limit a court's subject matter jurisdiction, it did so clearly and unambiguously. Thus, the Act expressly provides that "[n]o *State* court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (emphasis added). Given that example of an express exclusion of jurisdiction elsewhere in the same section of the Act, the only fair conclusion is that in *enforcement* cases Congress was content to allow litigants the choice between state and federal court for pursuit of their federal claims.

Finally, citing the *Rooker-Feldman* doctrine, the Fourth Circuit intimated that it would violate "basic tenets of federalism" for a federal court to review a state commission's decision absent a specific grant of jurisdiction.[15] Pet. App. 50a. At the outset, that is simply wrong. This Court's recent precedent confirms that section 1331 empowers federal courts to review state agency decisions alleged to violate federal law. *See City of Chicago*, 522 U.S. at 163-64.

The *Rooker-Feldman* doctrine is inapposite for additional reasons. Under that doctrine, which represents the Court's interpretation of its jurisdictional grant in 28 U.S.C. § 1257,

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[15] Whether the *Rooker-Feldman* doctrine applies is beyond the limited question on which the Court granted certiorari here.

lower federal courts lack jurisdiction to hear appeals from decisions of a state's highest court or to decide issues "inextricably intertwined" with the judgment of a state's highest court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).[16] This Court has never applied the *Rooker-Feldman* doctrine to decisions of state agencies that were not first reviewed by a state's highest court. To do so would foreclose resort to federal district court under section 1983 for virtually all alleged violations of federal law committed by state administrative agencies. This Court has consistently rejected imposition of such exhaustion requirements under section 1983. *See Edwards v. Balisok*, 520 U.S. 641, 649 (1997) (citing *Heck v. Humphrey*, 512 U.S. 477 481, 483 (1994)).[17]

CONCLUSION

For the reasons set forth above, the Court should reverse the Fourth Circuit's decision that the district court lacked general federal question jurisdiction under 28 U.S.C. § 1331.

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[16] 28 U.S.C. § 1257 gives this Court jurisdiction to hear certain appeals from the highest court of a state. *See* 28 U.S.C. § 1257. The modern *Rooker-Feldman* doctrine is derived from the negative implication of that statute that the jurisdiction given to this Court is exclusive and does not extend to the lower federal courts.

[17] The *Rooker-Feldman* doctrine is inapplicable for the additional reason that section 252(e)(6) provides for a federal court action to review enforcement determinations. Where Congress specifically provides for a federal court action, the specific statutory grant overrides the more general negative implication of 28 U.S.C. § 1257 on which the *Rooker-Feldman* doctrine is based. *See generally, Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

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In the Supreme Court of the United States

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (reproduced in the Appendix to Verizon Maryland's petition for a writ of certiorari in No. 00-1531, [hereinafter Verizon Pet. App.] at 1a-72a) is reported at 240 F.3d 279. The opinion of the district court (Verizon Pet. App. 73a-90a) is unreported. The order of the Maryland Public Service Commission (Verizon Pet. App. 91a-111a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. Verizon Maryland filed a petition

for a writ of certiorari on April 5, 2001, and the United States filed a petition for a writ of certiorari on May 15, 2001. Both petitions were granted on June 25, 2001, limited to the second question presented in each petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant portions of the Telecommunications Act of 1996, the Federal Communications Commission's implementing regulations, and 28 U.S.C. 1331 are set forth at Verizon Pet. App. 112a-134a. Citations of the Act are of the 1999 Supplement to the United States Code.

STATEMENT

The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The 1996 Act establishes procedures to encourage competition in local telecommunications markets, including the requirement that incumbent carriers enter into agreements with competitors concerning interconnection with, and access to elements of, the incumbent's network. The Act authorizes state public utility commissions to assume certain regulatory authority respecting those agreements (commonly referred to as interconnection agreements). This case concerns whether the federal district courts have subject matter jurisdiction under 28 U.S.C. 1331 to review state commission decisions

construing and enforcing interconnection agreements for compliance with federal law.

1. For many years, most telephone service in the United States was provided by AT&T and its local-exchange affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1 *et seq.*, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). In 1982, AT&T entered into a consent decree in settlement of that suit that required AT&T to divest its local exchange operations. The newly independent Bell Operating Companies, together with approximately 1,500 non-Bell carriers, continued to provide monopoly local exchange service in their respective service areas. What remained of AT&T continued to provide nationwide long-distance service, increasingly in competition with other long-distance carriers, such as MCI and Sprint. See H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 48-50 (1995).

a. In considering how to facilitate the entry of competitors into local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's entire local network —*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the

existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Congress addressed those concerns in Sections 251 and 252 of the 1996 Act. It imposed various obligations on all local exchange carriers, incumbents and new entrants alike, including the obligations to provide number portability (so that a consumer may change carriers without changing telephone numbers), to allow competitors to have access to certain services (*e.g.*, directory assistance) and facilities (*e.g.*, poles, ducts, conduits, and rights-of-way), and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). The underlying dispute in this case concerns an arrangement to pay reciprocal compensation, which is a payment made by the carrier whose customer originates a call to the carrier whose facilities are used to complete the call.

Congress also imposed on incumbent carriers the obligation to open their networks to new entrants in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2). Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants

are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4).[1]

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding reciprocal compensation, interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration if the parties cannot conclude an interconnection agreement through negotiation. 47 U.S.C. 252(b).

The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and in regulations promulgated by the Federal Communications Commission (FCC) pursuant to the Act), arbitrate disputes that arise in the negotiation of the agreements, and exercise review and enforcement authority. If a state commission elects not to assume such authority, the FCC will perform that role. 47 U.S.C. 252(e)(5).

b. All interconnection agreements, whether arrived at through negotiation or arbitration, are subject to approval by the state commission or, if it declines that role, the FCC. 47 U.S.C. 252(e)(1) and (5). A negotiated agreement may be approved by the state commission (or the FCC) only if it does not "discriminate[] against a telecommunications carrier not a party to the

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[1] The Court is currently considering a challenge to the methodology developed by the Federal Communications Commission (FCC) for establishing the rates that incumbents may charge new entrants for interconnection and access to network elements. See *Verizon Communications, Inc.* v. *FCC*, Nos. 00-511 et al. (to be argued Oct. 10, 2001).

agreement" and is "consistent with the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state commission (or, if it declines that role, the FCC) will resolve any open issue. Such issues may concern the rates, terms, and conditions under which competitors will interconnect with or lease network elements from incumbents, as well as the charges that the incumbent and the new entrant will pay each other for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). Once an agreement has been concluded through arbitration, the parties must submit it to the state commission (or, if it declines that role, the FCC) for approval. An arbitrated agreement may be approved only if it complies with Sections 251 and 252 of the Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B).

The 1996 Act provides for federal court "[r]eview of State commission actions" with respect to interconnection agreements. 47 U.S.C. 252(e)(6) (title). The Act states, in relevant part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6). The Act divests state courts of "jurisdiction to review the action of a State commission

in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

Where a state commission has elected not to assume regulatory authority under the 1996 Act and the FCC has acted in its place, the Act provides that the FCC proceeding and "any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. 252(e)(6). The FCC's final orders with respect to interconnection agreements are reviewable, as are other final orders of the FCC, in the federal courts of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*

2. The Maryland Public Service Commission (MPSC) has elected to exercise regulatory authority under the 1996 Act. The MPSC approved interconnection agreements, which were arrived at through negotiations, between Bell Atlantic, the incumbent provider of local telecommunications service in Maryland (and a predecessor to Verizon Communications, Inc.), and prospective entrants into the local telecommunications market, including MCI WorldCom. As required under the Act and the FCC's implementing regulations, those agreements provided for the payment of reciprocal compensation for "local" calls. See 47 U.S.C. 251(b)(5); 47 C.F.R. 51.701(a) (2000).

A dispute subsequently arose among the parties as to whether Bell Atlantic had an obligation under the agreements to pay reciprocal compensation for its customers' calls to Internet service providers (ISPs) to gain access to the Internet. The MPSC exercised regulatory authority over the dispute. It issued a determination that such calls are "local" and ordered the payment of reciprocal compensation.

3. Bell Atlantic sought review of the MPSC's decision in the United States District Court of the District of Maryland, asserting that the MPSC's decision was contrary to federal law, as reflected in a recent ruling of the FCC under the 1996 Act (see pp. 18-19, *infra*), and invoking the court's jurisdiction under 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331. Bell Atlantic named as defendants the MPSC, the individual MPSC commissioners in their official capacities, and the competing carriers that are parties to the agreements.

The MPSC and its commissioners moved to dismiss. They argued that federal district courts lack subject-matter jurisdiction to review decisions of state public utility commissions interpreting and enforcing a previously approved interconnection agreement. They also argued that state commissions and their commissioners are immune from such suits under the Eleventh Amendment. The United States intervened to defend the constitutionality of the judicial review provisions of the 1996 Act.

The district court dismissed the suit. The court concluded that the Eleventh Amendment barred suit against the MPSC and its individual members. Verizon Pet. App. 77a-84a. The court rejected the argument that the MPSC had waived its sovereign immunity by voluntarily electing to exercise regulatory authority under the 1996 Act. *Id.* at 77a-79a. The court also rejected the argument that the suit could proceed against the individual commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against state officers in their official capacities to enjoin ongoing violations of federal law. Verizon Pet. App. 79a-83a. The court then concluded that the MPSC was an indispensable party to the action under Rule 19 of the Federal Rules of Civil Procedure, and thus that

the action had to be dismissed against the other defendants as well. *Id.* at 84a-86a.

4. A divided panel of the United States Court of Appeals for the Fourth Circuit affirmed. The court held that state public utility commissions and their commissioners are immune from suit in federal court under the Eleventh Amendment. The court also held that the district courts lack subject-matter jurisdiction to review state commission decisions enforcing or interpreting previously approved interconnection agreements. Verizon Pet. App. 1a-51a.

First, the court held that the MPSC had not waived its sovereign immunity by electing to exercise regulatory authority over interconnection agreements entered into pursuant to the 1996 Act. Verizon Pet. App. 14a-21a. The court accepted that "a State commission that elects to make § 252 determinations must, of necessity, also be electing to have its determinations reviewed by a federal court under § 252(e)(6)." *Id.* at 14a-15a. But the court declined to "infer from this consent to federal-court review a consent by a State commission itself *to be made a party* to that federal review." *Id.* at 15a. The court noted that no provision of the Act expressly states that a state commission, by electing to regulate under the 1996 Act, "thereby agrees to be named as a party in federal court or * * * waives its Eleventh Amendment immunity." *Ibid.* The court concluded that, absent such an "unmistakably clear and unequivocal" expression of Congress's intent "to condition State utility commissions' participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit," no such waiver could properly be inferred. *Id.* at 18a-19a.

Second, the court held that the individual commissioners could not be made parties to the action

under *Ex parte Young*. Verizon Pet. App. 21a-30a. The court focused its analysis on "the federal interests served by permitting [such] a federal suit." *Id.* at 24a. The court reasoned that "[t]he federal interest furthered by the 1996 Act is to have § 252 determinations made by State commissions reviewed in federal court," and not "to discipline individual State officials or to expose them to any liability." *Ibid.* The court concluded that "this interest would not be frustrated if we were to preserve the Eleventh Amendment immunity of State officials with respect to such suits." *Id.* at 24a-25a.

In addition, the court expressed doubt that "Bell Atlantic's action is designed to prevent an ongoing violation of federal law," noting that federal law does not clearly prohibit the treatment of ISP-bound calls as "local" traffic. Verizon Pet. App. 25a-27a. The court suggested that, "in any suit against State commissioners, it is more likely that State contract-law, rather than federal-law, violations would be redressed." *Id.* at 29a.

The court also suggested that allowing *Ex parte Young* actions to challenge the decisions of state commissions "would improperly expand the federal remedy selected by Congress." Verizon Pet. App. 29a. The court construed the 1996 Act as reflecting Congress's determination to limit federal court review to only those decisions of state commissions that involve the initial approval or rejection of interconnection agreements. *Id.* at 28a-29a.

Third, the court held that federal district courts do not have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements, as distinguished from decisions approving or rejecting interconnection

agreements in the first instance. Verizon Pet. App. 30a-47a. The court noted that Section 252(e)(6) provides, by its terms, for review of state commission "determination[s] under this section [*i.e.*, Section 252]" to ascertain whether those determinations "meet[] the requirements of section 251 and this section [*i.e.*, Section 252]." *Id.* at 38a-39a. The court reasoned that "in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements." *Id.* at 39a. The court concluded that other state commission determinations, including those enforcing interconnection agreements, are "left for review as specified by State law." *Ibid.*

Here, the court noted that the MPSC had approved the interconnection agreements between Bell Atlantic and MCI WorldCom and that "no party challenged that approval" in the district court. Verizon Pet. App. 40a. The court concluded that the MPSC's subsequent decision construing and enforcing that agreement "was not a § 252 determination and therefore was not reviewable in federal court by virtue of § 252(e)(6)." *Id.* at 43a.

Finally, the court held that 28 U.S.C. 1331 likewise does not provide a basis for federal court jurisdiction to review state commission decisions enforcing interconnection agreements. Verizon Pet. App. 47a-50a. The court construed Section 252(e)(6) as reflecting a congressional intent to confine federal court review to state commission decisions approving or rejecting interconnection agreements. "[I]n light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6)," the court observed, "the exercise of § 1331 general federal-question jurisdiction would 'flout, or at least undermine, congressional intent.'" *Id.* at 48a (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804 (1986)).

5. Judge King dissented from the court's holdings on both the jurisdictional issue and the Eleventh Amendment issue, which he noted were in conflict with holdings of the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Verizon Pet. App. 52a-53a (citing cases). On the jurisdictional issue, Judge King concluded that federal district courts have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements. Verizon Pet. App. 54a-58a. He reasoned that "the power granted to states under § 252 to approve or reject interconnection agreements * * * necessarily includes the power to enforce the interconnection agreement." *Id.* at 55a (citation and internal quotation marks omitted). He therefore concluded that state commission decisions enforcing interconnection agreements are "determinations under [Section 252]" within the meaning of the grant of federal court jurisdiction in Section 252(e)(6). *Id.* at 57a. He did not reach the question whether federal courts also, or alternatively, have jurisdiction under 28 U.S.C. 1331 to review such state commission decisions.

On the Eleventh Amendment issue, Judge King concluded that the MPSC waived its sovereign immunity by electing to exercise regulatory authority under the 1996 Act. Verizon Pet. App. 59a-67a. He disagreed with the court's determination that Congress had not invited the States to waive their sovereign immunity with sufficient clarity. He viewed the judicial review provisions of the Act as "clearly show[ing] Congress's intent to subject participating states to suits in federal court." *Id.* at 60a-61a.

In the alternative, Judge King concluded that the individual MPSC commissioners are amenable to suit under *Ex parte Young*. Verizon Pet. App. 67a-71a. He

reasoned that the 1996 Act does not impose an elaborate remedial scheme that would be improperly "expand[ed]" by allowing such review, *id.* at 69a-70a, and that Maryland has no "special sovereignty interest" in the regulation of those aspects of local telecommunications that now are governed by the Act, *id.* at 71a.

SUMMARY OF ARGUMENT

The federal district courts have subject-matter jurisdiction over suits that challenge, as contrary to federal law, orders of state public utility commissions interpreting or enforcing interconnection agreements. That jurisdiction derives from either, or both, of two sources: 47 U.S.C. 252(e)(6), the judicial review provision of the 1996 Act, and 28 U.S.C. 1331, the general federal-question jurisdiction statute. The Court is considering in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, whether Section 252(e)(6) confers jurisdiction on the district courts to review such orders. This case concerns whether jurisdiction also, or alternatively, exists under Section 1331.

Section 1331 provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions arising under the * * * laws * * * of the United States." Section 1331 thus encompasses suits that seek "injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). This is such a suit. Bell Atlantic contends that the MPSC has construed its interconnection agreements in a manner that conflicts with, and thus is preempted by, federal law, specifically

a declaratory ruling issued by the FCC pursuant to the 1996 Act.

The court of appeals, while not disputing that Bell Atlantic's suit is one "arising under the * * * laws * * * of the United States," nonetheless held that the suit was not within the district court's jurisdiction under Section 1331. The court of appeals construed Section 252(e)(6), which provides the district courts with jurisdiction to review a state commission's "determination under [Section 252]" of the 1996 Act, as applying only to a determination approving or rejecting a new interconnection agreement, and not to a determination interpreting or enforcing an existing agreement. The court of appeals then concluded that it would "undermine" congressional intent to allow state commission determinations that are not (in the court's view) reviewable in district court under Section 252(e)(6) nonetheless to be reviewable under Section 1331.

The court of appeals' reasoning is not supported by the text of Section 252(e)(6) or by the congressional purpose underlying the local competition provisions of the 1996 Act. Section 252(e)(6) simply provides that the district courts possess jurisdiction with respect to certain categories of cases arising under the Act. It does not purport to curtail the district courts' existing jurisdiction under Section 1331 with respect to cases arising under federal law generally. Moreover, in a companion provision of the Act, Congress expressly provided that "[n]o State court shall have jurisdiction to review the action of a State commission" in certain contexts, 47 U.S.C. 252(e)(4). Presumably, if Congress intended similarly to restrict the jurisdiction of the federal courts, Congress would have used similarly preclusive language.

Congress enacted the 1996 Act with the purpose of establishing a federal regulatory regime with respect to local telecommunications competition. Congress permitted state commissions, if they chose, to play a role in that regime, but only in accordance with the new federal standards and procedures. Congress wanted the federal district courts to be available to assure that state commissions properly apply those federal standards; indeed, Congress made the federal courts the exclusive forum to review state commissions' orders approving or rejecting interconnection agreements under the Act. It does not stand to reason that Congress at the same time intended to divest the district courts of jurisdiction over suits contending that other actions of state commissions with respect to interconnection agreements violate controlling federal law.

ARGUMENT

FEDERAL DISTRICT COURTS HAVE JURISDICTION UNDER 28 U.S.C. 1331 TO ADJUDICATE SUITS "ARISING UNDER THE * * * LAWS * * * OF THE UNITED STATES" TO CHALLENGE STATE COMMISSION ORDERS INTERPRETING OR ENFORCING INTERCONNECTION AGREEMENTS

1. This Court granted certiorari in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, to consider, among other things, whether 47 U.S.C. 252(e)(6), the judicial review provision of the 1996 Act, grants the district courts jurisdiction to review state commission orders interpreting or enforcing existing interconnection agreements for compliance with the Act. Section

252(e)(6), titled "Review of State commission actions," states, in pertinent part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6).

Section 252 expressly provides that, when an interconnection agreement is concluded through either negotiation or arbitration, the agreement must be submitted to the state commissions for its approval or rejection. See 47 U.S.C. 252(a) and (b). It is therefore undisputed that a state commission "makes a determination under [Section 252]" when it approves or rejects an interconnection agreement in the first instance. Those are not, however, the *only* state commission decisions that are reviewable under Section 252(e)(6), as every court of appeals that has addressed the question, with the exception of the Fourth Circuit here, has recognized.[2] A state commission's authority under Section 252 to approve an interconnection agreement necessarily encompasses the authority to interpret and enforce the agreement as disputes subsequently arise in its implementation. Accordingly, a

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[2] See *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-497 (10th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-480 (5th Cir. 2000).

state commission's order interpreting or enforcing an existing agreement is a "determination under [Section 252]" that is reviewable in federal district court under Section 252(e)(6). See U.S. Br. 16-29, *Mathias*.

The question on which the Court granted certiorari in this case concerns an alternative basis of federal jurisdiction to review orders interpreting or enforcing interconnection agreements—namely, 28 U.S.C. 1331, the general federal-question jurisdiction statute. The Court need not resolve that question if, in *Mathias*, the Court holds that Section 252(e)(6) encompasses such orders. In any event, whether or not Section 252(e)(6) affirmatively vests the district courts with jurisdiction to review state commission orders interpreting or enforcing interconnection agreements, that provision certainly does not *divest* the district courts of the jurisdiction that they ordinarily possess under Section 1331 with respect to claims arising under federal law. Accordingly, the district court has jurisdiction under Section 1331 to adjudicate Bell Atlantic's claim that the MPSC construed and enforced its interconnection agreements in a manner that is contrary to, and thus is preempted by, controlling federal law.

2. Section 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. This Court has recognized that Section 1331 provides the district courts with jurisdiction over suits to enjoin state regulatory action on the ground that such action is contrary to federal law:

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of

> the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing cases); see also, *e.g.*, *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985) (noting that a suit seeking "a declaratory judgment that [a] state statute conflicted with [a] federal Act and was therefore invalid under the Supremacy Clause" was "one arising under federal law for purposes of federal jurisdiction under 28 U.S.C. § 1331").

This is such a case. The gravamen of Bell Atlantic's complaint in the district court is that the MPSC issued an order that "is in direct conflict with a declaratory ruling issued February 26, 1999 by the Federal Communications Commission" pursuant to the 1996 Act. Verizon Pet. App. 73a-74a; see also *id.* at 75a-76a (describing allegations of complaint). The interconnection agreements between Bell Atlantic and competing carriers provide for the payment of reciprocal compensation "for the transport and termination of Local Traffic." *Id.* at 109a. The agreements do not specify whether the term "Local Traffic" includes calls to ISPs to gain access to the Internet. After the agreements took effect, the FCC issued a declaratory ruling that, among other things, characterized ISP calls as "largely interstate," and thus as outside the scope of any obligation to pay reciprocal compensation imposed by the 1996 Act and its implementing regulations. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (Declaratory Ruling), 14 F.C.C.R. 3689, 3690 (1999), vacated and re-

manded, *Bell Atlantic Tel. Cos.* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000). The MPSC nonetheless continued to construe the agreements at issue here, with their provision for the payment of reciprocal compensation for "Local Traffic," as requiring reciprocal compensation for ISP calls.[3]

Bell Atlantic's suit thus turns on the resolution of a federal question: whether the FCC's Declaratory Ruling (or the considerations underlying that Ruling) precludes state commissions from construing existing interconnection agreements to require the payment of reciprocal compensation for ISP calls. The task of resolving that question on the merits has been complicated by the decision of the District of Columbia Circuit vacating the Declaratory Ruling and the

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[3] Although the 1996 Act imposes a general duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. 251(b)(5), the FCC's implementing regulations at that time limited the requirement to "local telecommunications traffic," 47 C.F.R. 51.701(a) (2000). See Verizon Pet. App. 26a-27a. In the Declaratory Ruling, the FCC concluded that calls to ISPs are primarily interstate, reasoning that the communication does not terminate with the local ISP, but instead extends to out-of-state websites. See 14 F.C.C.R. at 3690 (para. 1). The FCC also stated, however, that parties may include in their interconnection agreements a provision for the payment of reciprocal compensation for ISP calls and that state commissions may construe existing agreements as requiring such payment. *Id.* at 3703-3705 (paras. 24-25). On review, the D.C. Circuit principally held that the FCC had not adequately justified the use of a so-called "end-to-end" analysis, which the FCC has traditionally used to determine whether a call is within its interstate jurisdiction, to determine whether ISP calls are local or non-local for purposes of 47 U.S.C. 251(b)(5) and 47 C.F.R. 51.701(a). See *Bell Atlantic Tel Cos.* v. *FCC*, 206 F.3d at 4-5. The court vacated the Declaratory Ruling and remanded the matter to the FCC for further proceedings.

pendency of further FCC proceedings on remand. See note 3, *supra*. But that does not affect the jurisdictional question on which this Court has granted review; nor does it detract from the quintessentially federal character of the underlying question sought to be resolved by the invocation of the district court's jurisdiction in this case.

3. The court of appeals, although holding that the federal courts do not have jurisdiction over Bell Atlantic's suit pursuant to Section 1331, did not dispute that the suit is one "arising under the * * * laws * * * of the United States" within the meaning of Section 1331.[4] Instead, the court of appeals perceived the grant of jurisdiction to federal courts in 47 U.S.C. 252(e)(6) as *curtailing* the jurisdiction otherwise available to federal courts under 28 U.S.C. 1331. Verizon Pet. App. 48a. Thus, the court of appeals reasoned, "in light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6), the exercise of § 1331 general federal-question jurisdiction would 'flout, or at least undermine, congressional intent.'" *Ibid.* (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804 (1986)). That conclusion is incorrect.

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[4] In holding that this suit could not proceed against the state commissioners under *Ex parte Young*, the court of appeals suggested that a carrier, such as Bell Atlantic here, could not "allege an ongoing violation of federal law when the State commission determines as a matter of State contract law that the parties agreed to treat ISP-bound calls as local for purposes of reciprocal compensation." Verizon Pet. App. 27a-28a. But that suggestion itself depends on the court of appeals' conclusion concerning a question of federal law: that the FCC's Declaratory Ruling "explicitly allows for a result of the kind reached by the State commission in this case." *Id.* at 28a.

a. Nothing in the text of Section 252(e)(6), which makes clear that the federal courts possess jurisdiction with respect to certain cases arising under the 1996 Act, purports to restrict the federal courts' jurisdiction under Section 1331 with respect to other cases. Congress enacted the 1996 Act, including its judicial review provisions, against the backdrop of Section 1331, with its conferral of jurisdiction over "*all* civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331 (emphasis added). Congress must be presumed to understand that, in order to withdraw the federal courts' existing jurisdiction over some category of cases arising under federal law, a statute would have to speak in language of divestment. See *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (recognizing that the district courts' "general federal-question jurisdiction under 28 U.S.C. § 1331 to hear [an] action remains unimpaired" unless Congress has clearly precluded such jurisdiction). But Congress did not employ such language in Section 252(e)(6).[5]

Moreover, in a companion provision of Section 252, Congress declared, in no uncertain terms, that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

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[5] The MPSC argued to the court of appeals, as the state commissioners argue to this Court in *Mathias*, that Section 252(e)(6) does not confer federal jurisdiction to review orders interpreting or enforcing interconnection agreements, because the 1996 Act does not specifically refer to such orders. At the same time, the MPSC argued that Section 252(e)(6) revokes federal court jurisdiction under Section 1331 with respect to suits challenging such orders as contrary to federal law, even though the Act does not specifically refer to such orders. Both of those propositions cannot be correct; but both may be, and in fact are, incorrect.

Presumably, if Congress intended similarly to deprive the federal courts of jurisdiction over certain categories of cases arising under federal law, Congress would have spoken in similar terms. Instead, however, Congress used entirely different language in Section 252(e)(6), which is consistent with federal court jurisdiction over all cases arising under the 1996 Act, whether jurisdiction is based on Section 252(e)(6) or Section 1331. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Congress knows quite well how to preclude judicial review under Section 1331 if it so desires. For example, in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999), this Court confirmed that a provision of the Medicare Act, 42 U.S.C. 405(h), bars suits under Section 1331. That provision states, in relevant part, that "[n]o action against * * * the [Secretary] or any officer or employee thereof shall be brought under section 1331 * * * of title 28 to recover on any claim arising under this subchapter." 525 U.S. at 456. No comparable language in the 1996 Act purports to divest the federal courts of jurisdiction under Section 1331 with respect to suits contending that certain orders of state commissions violate federal law.

b. Nor is there any indication in the purpose or history of the 1996 Act that Congress intended to deprive the district courts of the jurisdiction that they ordinarily possess with respect to cases arising under federal law. Indeed, all indications are to the contrary.

In the 1996 Act, Congress established a new federal regulatory regime to govern local telecommunications

competition; as this Court has observed, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). Congress allowed the States, through their state commissions, to play a role in that new regime, but only in accordance with the new federal standards (and any consistent state standards). Congress wanted the federal courts to be available to assure that state commissions properly apply those federal standards. Thus, Congress made the federal courts the exclusive forum to review state commissions' orders approving or rejecting interconnection agreements under the 1996 Act. It does not stand to reason that Congress at the same time stripped the federal courts of jurisdiction over suits contending that other regulatory actions of state commissions with respect to interconnection agreements are contrary to federal law.

Congress would have understood that important issues of federal law would be implicated by state commissions' decisions interpreting and enforcing interconnection agreements as well as by decisions approving or rejecting such agreements in the first instance. It may often be the case that such issues do not arise until an agreement has been in place for some time. For example, given the rapidity of technological change within the telecommunications industry, disputes may arise during the term of the agreement as to whether, or to what extent, old terminology applies to new circumstances. The underlying dispute in this case concerning the characterization of calls to ISPs is illustrative. Congress could not have intended to deprive the district courts of jurisdiction to consider whether a

state commission has resolved such a dispute in a manner contrary to federal law.

c. The Sixth Circuit has held that certain state commission orders, although not reviewable in district court under Section 252(e)(6), are nonetheless reviewable under Section 1331. *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 919-920, cert. denied, 531 U.S. 957 (2000).[6] In so holding, the Sixth Circuit rejected the jurisdiction-stripping interpretation of Section 252(e)(6) adopted by the Fourth Circuit in this case, concluding that Section 252(e)(6) is not "the exclusive basis" for district court review of "state commission actions that in any way relate to interconnection agreements." *Id.* at 919. The court noted that construing Section 252(e)(6) to preclude the district courts from exercising jurisdiction over federal preemption challenges to state commission orders that are not themselves reviewable under that provision "would have enormous negative implications." *Ibid.* The court suggested, for example, that such a construction of Section 252(e)(6) would enable "state commissions [to] insulate regulatory requirements that violate the [1996 Act] from federal * * * court review," and would undermine "Congress's decision to establish federal procedures for negotiating interconnection rights and to concentrate judicial review of interconnection agreements in the federal courts." *Ibid.*

4. Finally, the court of appeals perceived that "it would violate basic tenets of federalism" to allow

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[6] *Strand* did not concern judicial review of a state commission order, such as the one at issue here, that construes and enforces an existing interconnection agreement. Rather, *Strand* concerned judicial review of a state commission order that imposed certain requirements on incumbent carriers independent of any interconnection agreement. See *Strand*, 209 F.3d at 914.

federal court review of the decisions of a state commission "in the absence of specific federal authorization." Verizon Pet. App. 50a (citing *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)). This Court has recognized, however, that general statutory language is sufficient to confer jurisdiction on the district courts over suits challenging the decisions of a state agency or state official as contrary to federal law. See, *e.g.*, *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 169 (1997) ("federal jurisdiction generally encompasses judicial review of state administrative decisions"); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 786-787 n.4 (1991).

The assertedly "quasi-judicial" status of the MPSC under state law (Verizon Pet. App. 50a) does not alter the analysis. The *Rooker-Feldman* abstention doctrine, which bars the lower federal courts from entertaining challenges to the decisions of state courts, rests on a rationale that does not extend to the decisions of state commissions. "The *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 622 (1989); see *Rooker*, 263 U.S. at 415-416. Section 1257 does not itself address judicial review of the decisions of state commissions. Nor is there any statutory counterpart to Section 1257 that applies to decisions of state commissions, even those commissions that might arguably be characterized as performing "quasi-judicial" functions.

Finally, any federalism concerns presented by federal court review in the circumstances of this case are significantly attenuated. As noted above, the States

have chosen to participate in the federal regulatory scheme established by the 1996 Act, which requires the application of federal standards set by Congress and the FCC. Even the court of appeals acknowledged that States made that choice on the understanding that many state commission decisions would be reviewable in federal court. Verizon Pet. App. 14a-15a. It is thus neither surprising nor offensive to federalism principles for Congress to have contemplated that, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, either under Section 252(e)(6) or under Section 1331.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings, which may, if appropriate, include further consideration in light of the Court's decision in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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October 26, 2001

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QUESTION PRESENTED

Whether a federal district court has subject matter jurisdiction under 28 U.S.C. §1331 to review State commission actions taken pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§151 *et seq.*

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No. 00-1531 & 00-1711

IN THE

SUPREME COURT OF THE UNITED STATES

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the Public Service Commission of Maryland ("Maryland Commission" or "MDPSC"). The Maryland Commission is an agency of the State of Maryland and it supervises and regulates telecommunications carriers in Maryland. As part of its responsibilities, the Maryland Commission administers and enforces the *Public Utility Companies Article ("PUC Article")* of the Maryland Code. Final orders or decisions of the Maryland Commission are subject to judicial review in Maryland circuit courts, *PUC Article*, §3-204. Parties are entitled to further review by the Maryland Court of Special Appeals. *Id.* at §3-209.

This case began at the Maryland Commission when Verizon Maryland, Inc. ("Verizon") filed a request for declaratory ruling asking that the Maryland Commission find that Verizon was not obligated under §251 of the Telecommunications Act of 1996 ("1996 Act") to pay reciprocal compensation for calls delivered to Internet Service Providers ("ISPs") who are served by competitive local exchange carriers ("CLECs"). The Maryland Commission issued a declaratory ruling finding that Verizon must continue to pay reciprocal compensation and Verizon sought review of this order pursuant to §252(e)(6) of the 1996 Act, 47 U.S.C. §251 et. seq. and 28 U.S.C. §1331.

The District Court of Maryland dismissed Verizon's complaint, finding that both the Maryland Commission and the individual commissioners were immune from suit under the Eleventh Amendment (Pet. App. 77a-84a);[1] and also

[1] "Pet. App." refers to the Appendix to Verizon Maryland, Inc.'s Petition No. 00-1531.

finding that the Eleventh Amendment would bar suit brought pursuant to 28 U.S.C. §1331 (Pet. App. 90a). On appeal, the United States Court of Appeals for the Fourth Circuit held that the Maryland Commission did not waive its Eleventh Amendment immunity when it implemented the 1996 Act. (*Id.* at 14a - 21a). The Fourth Circuit further found that the *Ex parte Young*[2] doctrine did not permit an action against the individual commissioners in their official capacity. (*Id.* at 21a - 30). The Court also found that a State commission's action interpreting or enforcing an interconnection agreement under the 1996 Act was not a "determination" under 47 U.S.C. §252(e)(6). (*Id.* at 30a - 47a). Finally, with regard to the issue presented in this case, the Fourth Circuit held that 28 U.S.C. §1331 does not provide a federal district court with independent subject matter jurisdiction to review a decision rendered by a State commission pursuant to the 1996 Act. (*Id.* at 50a).

A. THE TELECOMMUNICATIONS ACT OF 1996

Congress enacted the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 et seq.), to open the local telecommunications markets to competition.[3] The

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[2] *Ex parte Young*, 209 U.S. 123 (1908).

[3] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York and Washington. Competition rules were in place in Arizona Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau (Spring 1996) at page 3.

1996 Act[4] imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as Verizon, the duty to interconnect is even more specifically defined by §251(c)(2). In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of §251.

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the 1996 Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier, or the implementation of such

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[4] *See*, 47 U.S.C. §§251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

an agreement is not consistent with the public interest. 47 U.S.C. §252(e)(2)(A).

B. PROCEEDINGS BEFORE THE MARYLAND COMMISSION

Pursuant to the 1996 Act, MFS Intelenet of Maryland, Inc. ("MFS") and Verizon entered into an interconnection agreement on July 16, 1996. The Maryland Commission approved this agreement on October 9, 1996. On April 28, 1997, Verizon informed MFS that it would discontinue payment of reciprocal compensation for calls to ISPs, claiming that the Agreement's reciprocal compensation provisions did not apply to calls to ISPs. On May 21, 1997, MFS filed a complaint with the Maryland Commission alleging that the actions of Verizon violated the 1996 Act and the MFS Agreement. On September 11, 1997, the Maryland Commission found that Verizon must pay reciprocal compensation to MFS for calls to ISPs under the terms of the Agreement. The Maryland Commission's decision was upheld by the Circuit Court for Montgomery County, Maryland.[5]

The Maryland Commission considered this issue a second time within the context of a Sprint Communications Company, L.P. ("Sprint") arbitration complaint. Sprint filed a Motion for Resolution of Disputed Issue, seeking a Commission ruling on how ISP-bound calls should be treated. The Maryland Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from Verizon.

On February 26, 1999, the Federal Communications Commission ("FCC") released an Order addressing the

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[5] *Bell Atlantic Maryland, Inc. v. Maryland Public Service Commission*, Civil Action No. 178260, Docket Entry #26, March 26, 1998.

jurisdictional status of calls to ISPs.[6] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by State commissions."[7] The *ISP Order* held that a carrier's right to reciprocal compensation for calls to ISPs was governed by the terms of the parties interconnection agreement. (Pet. App. 96a-97a). The FCC further held that there is "no reason to interfere with state commission findings" regarding ISP compensation *ISP Order* ¶21. The FCC described several factors that State commissions might consider in determining whether parties had agreed to pay reciprocal compensation for calls to ISPs. One factor was that for years both the FCC and ILECs traditionally treated calls to ISPs as local. ¶¶23-29. Pet. App. 97a-99a. In response to the *ISP Order*, Verizon asked the Maryland Commission to reconsider the previous decisions requiring reciprocal compensation for calls to ISPs.

On June 11, 1999, the Maryland Commission resolved the issue raised by Verizon. The Order has two distinct parts. First, with regard to the negotiated agreement, the Maryland Commission found that, under contract principles and using the analysis sanctioned by the FCC, parties to the agreement were entitled to reciprocal compensation for ISP-bound calls until July 1, 1999. (Pet. App. 103a-104a). Second, the Maryland Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated

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[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96, 14 F.C.C.R. 3689 (February 26, 1999). ("*ISP Order*")

[7] *Id.*, at para. 1. See, also, para. 22.

reciprocal compensation rates contained in the effective Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic. (Pet. App. 106a-107a).

C. THE DISTRICT COURT DECISION

Verizon sought review of the Maryland Commission's Order in the United States District Court for the District of Maryland. First, Verizon objected to the Maryland Commission's determination that Verizon should continue to pay reciprocal compensation for ISP-bound calls pursuant to the terms of the previously approved interconnection agreement. Verizon also objected to the Maryland Commission's determination that CLECs who do not have approved interconnection agreements shall receive the arbitrated reciprocal compensation rates contained in the effective SGAT as an interim compensation mechanism.

On October 20, 1999, the District Court dismissed Verizon's Complaint, holding that: (1) the Maryland Commission and the individual commissioners were immune from suit under the Eleventh Amendment[8] (Pet. App. 77a-84a); (2) the Maryland Commission was an indispensable party under Federal Rule of Civil Procedure 19(b) so that the case could not proceed without the Commission (Pet. App. 84a- 86a); (3) alternatively, Verizon's challenge to that portion of the Commission's Order relating to the SGAT was not ripe for review (Pet. App. 86a-90a) and (4) the Eleventh Amendment would bar suit brought pursuant to 28 USC §1331. (Pet. App. 90a).

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[8] Based on this holding, the District Court declined to address the Maryland Commission's contention that the Court lacked jurisdiction to review Commission decisions **enforcing** interconnection agreements (Pet. App. 76a n.3)

D. THE FOURTH CIRCUIT DECISION

Verizon and the United States Government appealed the District Court's decision. On February 14, 2001, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit reached four major conclusions. First, and foremost, the Court of Appeals found that the federal proceeding brought pursuant to §252(e)(6) of the 1996 Act against the Maryland Commission is constitutionally barred. The Fourth Circuit expressly found that Congress did not clearly manifest an intent to condition a State commission's participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. (Pet. App. 19a).

Second, and equally important, the Fourth Circuit also found that an action brought in federal court against the individual commissioners was constitutionally barred. Among other reasons, the Court of Appeals found that a federal court action against the State commissioners would improperly expand the federal remedy selected by Congress. (Pet. App. 29a).

The third determination by the Fourth Circuit was that §252(e)(6) does not confer jurisdiction on the federal courts to review a State commission's enforcement decisions. The Fourth Circuit found that because federal courts are courts of limited jurisdiction, decisions by State commissions that are not expressly designated for review in federal court are left for review by State courts. (Pet. App. 35a). The Court of Appeals then held that State commission orders administering and enforcing interconnection agreements are not §252 determinations (Pet. App. 47a). Thus, according to the Court, these orders are reviewable only by State courts. (*Id.*)

Finally, with regard to federal question jurisdiction, the Fourth Circuit held that 28 U.S.C. §1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. §252(e)(6). The Court of Appeals found that it "would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. §1331 override this effort." (Pet. App. 48a). According to the Fourth Circuit, "[t]he simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. §1331." (Pet. App. 49a) (citations omitted).

Judge King dissented, concluding that: (1) §252(e)(6) expressly confers jurisdiction on the federal courts to review the State's enforcement determinations; (*Id.* at 56a); (2) the States waived their sovereign immunity by participating in the regulation of interconnection agreements; and (3) the individual Commissioners could be sued for prospective injunctive relief. (*Id.* at 67a.) Judge King found it unnecessary to reach the 28 U.S.C. §1331 jurisdictional question. Id. at 58a n. 5. However, he asserted that the *Rooker-Feldman* doctrine was inapplicable. (*Id.*) (citations omitted).

SUMMARY OF ARGUMENT

1. Petitioners allege that the federal district courts have jurisdiction under 28 U.S.C. §1331.[9] However, Verizon's complaint does not meet the requirements necessary to

[9] Section 1331 provides in pertinent part, that "[t]he district courts shall have original jurisdictional of all civil actions arising under the . . . laws . . . of the United States."

establish jurisdiction under §1331.[10] The district courts have that jurisdiction which Congress grants through statute. Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

An analysis of the four factors established in *Cort v. Ash,* 422 U.S. 66 (1975), can only result in the conclusion that a private right of action may not be inferred from the 1996 Act. Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

2. Furthermore, §1331 jurisdiction may be preempted by a doctrine which requires jurisdiction to reside elsewhere. Congress has not abrogated the State commission's sovereign immunity pursuant to §1331. The Supreme Court has expressly held that §1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak,* 501 U.S. 775, 786 (1991). In light of this statement, no reasonable argument could be made that §1331 constitutes an abrogation of state immunity.

3. Moreover, State commissions cannot be found to have constructively waived their sovereign immunity by implementing the provisions of the 1996 Act. The Supreme Court repudiated the doctrine of constructive waiver in *College Savings Bank_ v. Fla. Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999). The

[10] The party seeking the federal forum must establish the basis for the court's jurisdiction. In this instance, Petitioners have failed to allege that federal law creates any cause of action. Jurisdiction may not be sustained on a theory that the plaintiff does not advance. *Healy v. SeaGull Specialty Co.,* 237 U.S. 479, 480 (1915).

Maryland Commission cannot be found to have waived its sovereign immunity by implementing the requirements of the 1996 Act. Congress has not unequivocally provided that the Maryland Commission waives its sovereign immunity when implementing the 1996 Act.

4. Similarly, the *Ex parte Young* doctrine is inapplicable to this situation. This Court should find that the 1996 Act is a detailed remedial scheme. Thus, pursuant to the restrictions placed on the *Ex parte Young* exception in *Seminole,* the doctrine cannot be used to avoid the Eleventh Amendment bar. Furthermore, the 1996 Act clearly indicates that Congress contemplated that the **State** would be the respondent.

5. Finally, this Court should apply the *Rooker-Feldman* doctrine and find that the lower federal courts lack jurisdiction over this suit. The Maryland Commission performs a judicial act when implementing or enforcing the 1996 Act. Important concepts of federalism require that the federal district court refrain from taking jurisdiction over this case.

ARGUMENT

I. THE 1996 ACT DOES NOT CREATE A PRIVATE CAUSE OF ACTION

The district courts have only that jurisdiction which Congress grants through statute. Even though Congress has conferred general federal question jurisdiction on the district courts under 28 U.S.C. §1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly stated constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S.

480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue. As this Court has found, "the source of plaintiff's rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provisions." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577, (1979).

There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exits. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal question. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921).[11]

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans*, 85 F.3d 1119, 1123 (5th Cir. 1996). By now, Congress is well aware of this presumption and how to provide private remedies. *See, Touche*, 442 U.S. at 572.

Appellants arguments rest on the faulty assumption that the existence of a federal statute automatically gives rise to §1331 jurisdiction.[12] However, this Court has held that

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[11] Since Verizon raised no state law claims, this second test is inapplicable to this appeal.

[12] Petitioners contend that if Congress had intended to restrict the jurisdiction of the federal district courts, it would have expressly precluded jurisdiction in the 1996 Act. This argument ignores the fact that federal district courts are courts of **limited** jurisdiction and only possess that jurisdiction which Congress expressly grants. Thus, "preclusive language" is unnecessary to establish that federal courts do not have jurisdiction.

"the fact a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon University of Chicago,* 441 U.S. 677, 688 (1979). Instead, a court must carefully analyze the four factors that *Cort v. Ash*, 422 U.S. 66 (1975), identifies as indicative of Congressional intent to create a private right of action.

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the factors considered include whether the plaintiff is part of the class for whose especial benefit the statute was passed; whether the indicia of legislative intent reveals a congressional purpose to provide a private cause of action or deny one; whether it is consistent with the underlying legislative scheme to imply such a remedy; and whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. at 78 (1975). (internal citations and quotations omitted).

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action. [13]

[13] The argument presented by the United States regarding the legislative history of the 1996 Act fails to cite any legislative history to support its bald assertions. (U.S. Brief at 23-24)

The legislative history of the 1996 Act establishes that Verizon is not a part of the class for whose special benefit the statute was enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (Emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . the result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses**, . . . indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 4748 (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers, not ILECs such as Verizon.

Furthermore, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a private cause of action. The only express grant of federal jurisdiction in the 1996 Act, §252(e)(6),[14] is limited.

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[14] Section 252(e)(6) provides, in pertinent part, "In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate

Under §252(e)(6), a district court's review of a State commission's approval or rejection of an interconnection agreement is limited to whether the agreement meets the requirements of §§251 and 252. It does not by its terms cover other aspects of a State commission's decision, such as consistency with State law, or matters addressed in §253. *See*, e.g. *Puerto Rico Telephone Company v. Telecommunications Regulatory Board*, 189 F 3d. 1 (1st Cir. 1999). Thus, §252(e)(6) is a very limited jurisdictional provision.[15]

This Court has held that the express provision by Congress of one method of enforcing a substantive rule suggests that Congress intended to preclude others. *Northwest Airlines v. Transport Workers*, 451 U.S. at 93-94 (1981). *See also, Nat'l RR Passenger Corp. v. Nat'l Assoc. of RR Passengers*, 414 U.S. 453, 455 (1978) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Northwest Airlines Inc.*, 451 U.S. at 97. ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.") Petitioners ignore this rule of statutory construction. The Fourth Circuit's conclusion that §252(e)(6) should be interpreted to curtail jurisdiction under §1331 is the correct application of this rule.

Federal district court to determine whether the agreement or statement meets the requirements of Section 251 of this title and this section."

[15] The Court should note that State court review is more efficient since State courts would have jurisdiction over the entire matter, including questions of State law. *See, Pennhurst v. Halderman*, 465 U.S. 89, 117 (1984).

Aside from the narrow remedy contained in §252(e)(6),[16] the 1996 Act also explicitly provides for federal court jurisdiction in two other sections. Section 274 creates federal jurisdiction in the electronic publishing area and Section 207 creates the same jurisdiction over interstate communications disputes. That Congress expressly provided for a private cause of action in these sections is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

The conclusion that Congress did not intend to create a private cause of action is further supported by the fact that Congress considered, but failed to include, a private right of action in the 1996 Act for violations of an interconnection agreement. Section 257 of the Senate Bill expressly provided for a private right of action. S. Rep. No. 104-23, 104th Cong., 1st Sess., at 104-05. However, this provision was not enacted in the final legislation. Congress' express grant of federal rights of action in three sections of the 1996 Act while deleting a similar provision from the Senate Bill, demonstrates that Congress did not intend to create an implied cause of action.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). In *California*, this Court found that statutes which

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[16] The district courts have construed §252(e)(6) narrowly. *See, e.g. Citizen's Utility Ratepayers Board v. McKee*, 946 F.Supp. 89 (D. Kan. 1996) (Plaintiff is not an aggrieved party under §252(e)(6); only the interconnecting service provider or affected local exchange carrier has standing pursuant to this provision.)

focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." *Id. at 294. See, also, T.I.M.E., Inc. v. United States,* 359 U.S. 464 (1959); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951) (Court is reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large). Nor is there any evidence that Congress anticipated that there would be a private remedy. In short, Congress did not intend a private federal remedy for violations of the statute that it enacted. Thus, the federal district court cannot exercise federal question jurisdiction and provide remedies for violation of the 1996 Act because assuming such jurisdiction is contrary to Congressional intent.[17]

This being the case, it is unnecessary to inquire further to determine whether the purpose of the Statute would be advanced by the judicial implication of a private action or whether such a remedy is traditionally relegated to state law. This Court has held that the federal judiciary will not engraft a remedy on a statute that Congress did not intend to provide. *California v. Sierra Club,* 451 U.S. at 297. These factors are only of relevance if the first two factors give indication of a Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

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[17] The United States misconstrues the Maryland Commission's argument. The MDPSC contends that §252(e)(6) does not grant jurisdiction over enforcement orders. However, contrary to the United States misinterpretation (United State Brief at pg 22 n. 5), the MDPSC never argued that §252(e)(6) "revoked" federal court jurisdiction. The Maryland Commission correctly contends that the inclusion of this narrow remedy means that Congress did not intend for broader private causes of action to be implied. Not only are these contentions not in conflict, both are correct.

However, with regard to whether the remedy is traditionally relegated to State law, in this instance it clearly was traditionally the province of the State. As noted by Justice Thomas, since the invention of the telephone the States have been exclusively responsible for regulatory intrastate telephone service. *AT&T Corp., v. Iowa Util. Bd.*, 525 U.S. 366, 403 (1999) (Thomas, J., joined by Rehnquist, C.J. & Breyer, J., concurring in part and dissenting in part). The Maryland Commission was charged with regulating telephone service in 1910. Maryland Chp. Laws, Chp. 180 (1910). When Congress entered the telecommunications field by enacting the Mann-Elkins Act (Ch. 301 §7, 36 Sta. 544-45 (1910)), it did not preempt the States' regulation of intrastate phone service *AT&T*, 525 U.S. at 403. (Thomas, J.) This jurisdictional separation remained unaltered until the passage of the 1996 Act.

During this period, States created extensive regulatory schemes implementing their authority over intrastate telephone service. In all instances, these regulatory schemes included the creation of administrative bodies as well as methods for appealing the decisions of those bodies. *See, e.g.*, Annotated Code of Maryland, *PUC Article*, §§3-202, 3-204, 3-209. Even after the passage of the 1996 Act, primary responsibility for overseeing the implementation of §§251 and 252 remains with State administrative agencies.

The conclusion that the 1996 Act does not create a private cause of action negates Verizon's claim of federal subject matter jurisdiction.[18] In the absence of a federal statutory cause of action, declaratory relief is available only

[18] This conclusion is in keeping with the Supreme Court's long-standing presumption against finding private actions under the Federal Communications Act of 1934. *See, Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, 316 U.S. 4, 14 (1942). (Act of 1934 "did not create new private rights").

when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any State regulation of matters within the scope of the federal statute. *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). *See also, Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2nd Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

The District Court of California reached the same conclusion concerning a challenge to §254 of the 1996 Act. In this case, the California Public Utilities Commission ("CPUC") adopted two end-user surcharges to finance intrastate universal telephone service programs. The Utility Reform Network challenged this decision as being preempted by the Telecommunications Act of 1996. The California District Court found that an individual may challenge State regulations despite the lack of statutory cause of action only when a federal statute forbids State regulation of the area that the State is purporting to regulate. In other words, only when the federal statute had "occupied the field" thereby preventing any State regulation of matters falling within the scope of the federal statute. *Turn v. CPUC*, 26 F. Supp. 2nd 1208, 1213 (N.D. Cal. 1998) The California court specifically noted that it was "not aware of any authority holding that a preemption cause of action may serve as a vehicle to challenge an otherwise permissible State regulation simply because it allegedly violates a substantive provision of a federal statute." *Id.* The Court concluded that the plaintiff could not challenge the CPUC's compliance with

the substantive provisions of the 1996 Act by means of a preemption cause of action. *Id.* at 1213-1214.

Several other courts also have found that jurisdiction is limited to the 1996 Act. In *Indiana Bell v. McCarty*, 30 F. Supp. 2d. 1100, 1102 (S.D. Ind. 1998), the district court explained that where Congress provides a means to seek review of an agency determination, alternative means of review are inapplicable. *Accord, see Michigan Bell v. MFS Intelenet*, 16 F. Supp. 2d. 710 (W.D. Mich. 1998); *GTE Northwest v. Nelson*, 969 F. Supp. 654, 656 (W.D. Wash. 1997). The conclusion of these courts is in keeping with the Supreme Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), which stands for the proposition that Congress' particular choice of remedies must be respected. Respect for Congressional intent means that generalized statutes cannot be used in place of the tailored ones Congress created.

No reasonable argument could be made contending that the 1996 Act entirely preempts State regulation of local exchange service or local exchange carriers. Among a variety of other things, §252 requires a State commission to determine rates in the context of an arbitration. *See, e.g.*, §§251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

Contrary to Petitioners' assertions, the Fourth Circuit's interpretation and reliance on *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15 (1982), was correct. In *Jackson*, the Court found that the mandatory incorporation of federal standards into a contract did not necessarily create federal question jurisdiction in an action based on a breach of those standards. *Jackson* involved a suit by a union alleging breach of a "§13(c) agreement", which preserved transit workers preexisting rights. This

guarantee was required by §13(c) of the Urban Mass Transportation Act of 1964, 41 U.S.C. §1609(c). The union argued that because the contract rights were guaranteed federal law, its complaint stated claims arising under federal law. The Court rejected that argument and found that Congress did not intend such contract actions to set forth federal claims. *Id.* at 21.[19]

Ironically, WorldCom's argument actually supports the Maryland Commission's position. WorldCom agrees that it is a question of State law "whether the interconnection agreement includes a dynamic incorporation of statutory interpretation." WorldCom Brief at 20. (citing Fourth Circuit Opinion at 27a). WorldCom also agrees with the Fourth Circuit's conclusion that merely because Congress required parties to enter into a contract does not render interpretation of that contract a federal question. *Id.* (citing Fourth Circuit Opinion at 49a) As stated by WorldCom, "nothing in the Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement into a federal question." *Id.*

However, WorldCom misreads *Jackson* when it states that the Court found that federal district court had jurisdiction over the union's complaint. To the contrary, the *Jackson* Court merely found that the federal district court had jurisdiction to determine whether the union had a cause of action. 457 U.S. at 21 n.6. The *Jackson* Court found that

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[19] A few years later, the Fifth Circuit also found that a contract incorporating a federal regulatory standard does not give rise to federal question jurisdiction. *Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 89 (5th Cir. 1986). ("We are aware of no cases in which any court . . . has held that a private contract can give rise to federal-question jurisdiction simply by incorporating some federal regulatory standard that would not be binding on the parties by its own force.")

the union had no cause of action, thus the federal court had no jurisdiction to entertain the union's complaint.

Applying the rationale of *Jackson* to the current situation, the Court should find that the interconnection agreement does not create federal question jurisdiction. The rights of both the ILEC and the CLEC are created by their contract, which may incorporate the federal standards. The 1996 Act expressly provides that the ILEC may negotiate an interconnection agreement without regard to the standards in §§251 (b) and (c). §252(a). Thus, any federal standards incorporated into a negotiated interconnection agreement were included at the choice of the parties. The parties, by their own choices, cannot create federal question jurisdiction.

Verizon's argument analogizing interconnection agreements to federal tariffs is only half correct. These agreements are analogous to tariffs, but to *State* tariffs not federal tariffs. Verizon's contention ignores that the State commission establishes the rates, provides the schedule for implementation and ensures that the rates and conditions meet the requirements of §251 and §252(c). The State commission is required to determine the wholesale prices for telecommunications services §252(d)(3). The State commission also may establish or enforce other requirements of State law in its review of that agreement §252(e)(3). The approved interconnection agreement is filed with the State commission, which has the obligation to make each agreement available for public inspection §252(h). Furthermore, Maryland, like other States, includes arbitrated rates in the Statement of Generally Available Terms ("SGAT"), which is a tariff filing available to any CLEC. See, §252(f). Thus, the interconnection agreements are analogous to State tariffs, not federal tariffs. The State commission exercises full responsibility for the terms and

conditions, even the responsibility of making those terms available to others.[20]

Verizon's contention that Maryland lacked authority under State law to hear complaints arising from interconnection agreements is simply incorrect. The terms of an interconnection agreement are established pursuant to State Commission order. The agreement is approved by State Commission order. Thus, a violation of any agreement is a violation of a Commission order subject to the full State enforcement powers of the Maryland Commission.

Petitioners have set up a strawman argument in an attempt to distract the Court from the real issue in this case. Contrary to Petitioners' assertions, the question in this proceeding is not whether anything in §252 withdraws federal question jurisdiction. This argument ignores the ample precedent of this Court establishing that federal district courts are courts of limited jurisdiction and thus only have that jurisdiction expressly granted by Congress. Petitioners' argument turns this proposition on its head and requires the Court to make the unprecedented finding that under §1331 federal district courts can hear virtually any claim unless Congress has expressly barred the court from hearing that claim.

The cases cited by Petitioners do not support the proposition they are espousing. This is not surprising given that the Petitioners present such novel view of the law. None of the authorities provided by the Petitioners support the concept that federal district courts can exercise §1331 jurisdiction in this instance.

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[20] The authorities cited by Verizon are inapposite because all involved tariffs approved by and filed with federal agencies.

The main authority cited by Verizon actually supports the Maryland Commission's position. In *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963), the Court examined the act at issue, its history and purposes. Based on this analysis, the Court found that the plaintiffs had a cause of action and the federal district court could exercise jurisdiction.[21] Thus, though required by federal law, the contract disputes did not "automatically" come within the federal district courts' jurisdiction.

Petitioners other authorities are simply inapposite. For example, Verizon cite *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) and *Stark v. Wickard*, 321 U.S. 288 (1944) to support its claim of jurisdiction. However, these cases involved federal agencies arguing that specific decisions were totally shielded from any court review. In contrast, the Maryland Commission contends that it's order is subject to review, but only by a State court. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) is similarly inapposite. *McNary* involved the specific issue of whether plaintiffs claims came within a specific statutory provision barring jurisdiction in certain circumstances. The sole issue was the applicability of this bar, the parties having conceded that in the absence of this statutory provision the plaintiffs had a cause of action.

WorldCom relies on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 583 (1998). In *Steel Co.* the statute at issue expressly provided for a citizen suit. Thus, plaintiffs did not have to establish a general cause of action, the question was whether this provision allowed for suit based on a historical violation. There was no question that the

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[21] This Court should note that the *Central Airlines* decision was rendered prior to the Court's decision in *Cort v. Ash*, *supra*, which established the four factors used to determine whether a private cause of action exists.

statute authorized the plaintiffs to sue.[22] Finally, the Petitioners inappropriately rely on a footnote in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). *Shaw* however involved a State regulation which was allegedly preempted by federal law. In the present instance the Maryland Commission's decision cannot "conflict" with the *ISP* Order. The Maryland Order expressly interpreted and applied the FCC decision. While one may argue that this interpretation is erroneous, to claim that the Maryland Order "conflicts with" or is "preempted by" the FCC Order is simply a misnomer. Since the Maryland Commission did not apply any State law which may be said to be preempted by a federal law, Petitioners' reliance on *Shaw* is misplaced.

Contrary to Petitioners' assertions, the federal district courts enjoyed no "preexisting jurisdiction" under the 1996 Act. Section 601 of the 1996 Act provides that the Act shall not be construed to modify or supercede Federal law. Federal law includes the requirement that plaintiffs establish a cause of action, either express or implied, under §1331 in order to establish jurisdiction. Petitioners' novel arguments regarding preexisting jurisdiction and express statutory bar should be rejected by this Court.

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. §1331.

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[22] The main question resolved by the Court was whether a court must resolve the Article III standing issue prior to resolving the statutory jurisdictional question.

II. THE ELEVENTH AMENDMENT MANDATES THAT THIS CASE BE DISMISSED.

A. The Maryland Commission Has Not Waived Its Sovereign Immunity.

Generally, the Eleventh Amendment divests federal courts of jurisdiction over suits brought by private parties against a state. *See, Marie O. v. Edgar*, 131 F.3d 610, 614 (7th Cir. 1997). The Eleventh Amendment presupposes that each state is a sovereign entity in the federal system and that "[i]t is inherent in the nature of sovereignty not to be amendable to the suit of an individual without [a state's] consent." *Hans v. Louisiana*, 134 U.S. 1 (1890). This Amendment has been interpreted to bar federal jurisdiction over suits against a state arising under the Constitution or Laws of the United States, whether those suits are brought by citizens of another state or by the state's own citizens. *Id.* The Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Eleventh Amendment immunity is similarly applicable to the Commission as an arm of the State of Maryland. *See, Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-46 (1993).

Previously, the Supreme Court identified three instances in which the Eleventh Amendment does not deprive an Article III court of jurisdiction to entertain allegations of state governmental wrongdoing. First, Congress may abrogate the States' Eleventh Amendment immunity "by making its intention unmistakably clear" in the text of a federal statute enacted pursuant to a constitutional provision that empowers Congress with abrogation rights. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Second, a state may waive Eleventh Amendment immunity *Parden v.*

Terminal Ry. Co., 377 U.S. 184 (1964). Finally, a court may consider a suit against a state official to enjoin a non-discretionary violation of federal law. *Ex parte Young*, 209 U.S. at 159-60.

This Court has repeatedly held that the Congressional power to abrogate the States' sovereign immunity can only be exercised by a clear legislative statement. *Dellmuth v. Muth*, 491 U.S. at 227-228 (1989). In *Blatchford v. Noatak*, 501 U.S. 775 (1991), the Supreme Court expressly found that §1331 does not suffice to abrogate immunity for all federal questions. *Id.* at 78. As noted by the *Blatchford* Court, "the fact that Congress granted *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claims." *Id.* at 786 n. 4 (Emphasis in original).

This Court's recent *Seminole* decision places limitations on a party's ability to bypass a State's immunity from suit in federal court. The decision restricts the power of Congress to abrogate state immunity. The decision also narrows the scope of the *Ex parte Young* exception to Eleventh Amendment immunity. Finally, *Seminole* arguably left open the issue of whether a State may impliedly waive its immunity to suit in federal court.

However, in *College Savings*, the Supreme Court repudiated the doctrine of constructive waiver. The Court found that the "constructive waiver experiment was ill conceived" and it overruled "whatever may remain of *Parden*," that doctrine's seminal decision.

Petitioners below maintained that constructive waiver is possible when Congress provides unambiguously that a State will be subject to suit if it engages in certain federally regulated conduct and the State voluntarily engages in that

conduct. The Supreme Court disagreed, finding that even an unambiguous statement of Congressional intent cannot be reconciled with the requirement that a State's waiver of sovereign immunity be unequivocal. *College Savings*, 527 U.S. at 680. (Citations omitted). Thus, a state does not consent to suit in Federal court simply by engaging in federally regulated conduct even where Congress has provided that the State will be subject to private suit if it engages in that conduct. *Id.* at 680-681. *See also, Fla. Dept. of Health v. Fla. Nursing Home Asso.*, 450 U.S. 147, 150 (1981) (State's participation or agreement to administer a federal program does not constitute a waiver of Eleventh Amendment immunity).

This Court should determine that the Maryland Commission cannot be found to have waived its sovereign immunity for two reasons. First, Congress lacks the constitutional authority, pursuant to the Commerce Clause, to condition the State's participation on that state's waiver of its Eleventh Amendment immunity. Second, the 1996 Act is neither a "gift" nor a "gratuity".

1) Congress Lacks the Constitutional Authority to Condition Grants Under the Commerce Clause.

In light of *Seminole* and *College Savings*, even assuming Congress expressly conditioned state participation in the regulatory scheme of the 1996 Act on waiver of the State's immunity to suit in federal court, Congress nevertheless was without authority to do so under the Commerce Clause. Art. I §8, Cl. 3. Any argument based on constructive waiver presupposes that Congress has the authority pursuant to Article I of the Constitution to force a state to waive its Eleventh Amendment immunity as a condition of participating in a field subject to federal

regulation. However, the *Seminole* Court stated in no uncertain terms, that "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction." 517 U.S. at 72-73. Thus, as noted by the *College Savings* Court, the *Seminole* decision "expressly repudiates" the proposition that Congress has authority, under the Commerce Clause, to expand Federal jurisdiction. *College Savings,* 527 U.S. at 683. Therefore, allowing federal courts to apply the doctrine of constructive waiver based on Congress' commerce powers would directly contravene the Supreme Court's express repudiation of this doctrine in *Seminole.*

The *Seminole* Court found that Congress cannot abrogate a state's Eleventh Amendment immunity pursuant to the Commerce Clause. 517 U.S. at 69. More specifically, the *Seminole* Court stated that "[e]ven when the Constitution rests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states." 517 U.S. at 72. The impact of *Seminole's* conclusion was explicitly stated by the *College Savings Court*, which found that "[r]ecognizing a congressional power to extract constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the anti-abrogation holding of *Seminole Tribe.*" 527 U.S. at 683.

Therefore, the conclusion that Congress could have excluded states from any role in the 1996 Act is irrelevant to determining whether a state has constructively waived its immunity. Under analysis, Congress would be permitted to do indirectly what it cannot do directly, namely, abrogate a state's immunity pursuant to the Commerce Clause by

making abrogation a "condition" of participation. See, eg. *Abril v. Virginia*, 145 F.3d 182, 190 n. 15 (4th Cir. 1998).

Since Congress has no authority under its Article I Commerce Clause powers to abrogate state sovereign immunity, *Seminole* 517 U.S. at 71-72, it follows the Congress may ***not*** make the waiver of sovereign immunity a condition to the state's action in a field that Congress has authority to regulate under the Commerce Clause. In the present case, where Congress is not empowered to abrogate the Eleventh Amendment immunity conferred upon the Commission directly, likewise it cannot do so indirectly through principles of constructive waiver. The Maryland Commission has not waived such protection by voluntarily participating in the regulation of telecommunications. The telecommunications industry indisputably involves a quintessential state interest - the provision of telecommunications services to the citizenry at competitive rates - protection of which Congress cannot condition on a state's waiver of vital state rights.

This Court should find that Congress lacks the constitutional authority to require states to waive their Eleventh Amendment immunity when it enacts legislation pursuant to the Commerce Clause. Since the Supreme Court has previously ruled that Congress cannot abrogate States' immunity through the Commerce Clause, it would be illogical to permit Congress to condition any "gift" on accepting abrogation of Eleventh Amendment immunity pursuant to this very same constitutional provision.

2) The 1996 Act is Neither a Gratuity Nor a Gift to the States from Congress.

In a strained effort to avoid the obvious impact of *College Savings,* Petitioners below contended that the 1996

Act is a "benefit" from Congress to the States and that, therefore, Congress is entitled to place conditions on the acceptance of that gift. This Court should reject this distortion of the *College Savings* analysis.

The threshold question is whether Congress had "unequivocally" expressed its intent that waiver of Eleventh Amendment immunity was a condition of the State's participation in the 1996 Act. The Supreme Court has required "an unequivocal expression of congressional intent" to obtain an Eleventh Amendment waiver from states. *Atascodero*, 473 U.S. 234, 238-40 (1985).[23] Congress must state the condition unambiguously. *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981). Congress must speak with a clear voice so that the States many exercise their choice to waive their immunity "knowingly cognizant of the consequences of their participation." *Id.*

Plainly, §1331 does not unequivocally express Congressional intent that a State waive its sovereign immunity when implementing the 1996 Act. As noted earlier, this Court has held that §1331 does not abrogate a States' Eleventh Amendment immunity. *Blatchford, supra.* This same provision certainly cannot be viewed as unambiguously requiring that States waive their sovereign immunity as a condition of participating in the regulatory scheme. In short, §1331 lacks the clear statement necessary so that a state participating in the 1996 Act's implementation requirements can choose to participate or not, fully cognizant

[23] In *Atascadero,* the Court held that a general jurisdiction provision "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" and that it "likewise falls far short of manifesting a clear intent to condition a clear intend to condition participation in the program funded under the Act on a state's consent to waive its constitutional immunity. *Id.* at 246.

that Congress intended that this participation would subject the State to suit in federal district court pursuant to §1331.

The State commissions are merely agreeing to obey federal laws in participating in a federal program. Agreeing to obey federal law does not constitute an agreement to be sued in federal court. Prior to the enactment of the 1996 Act, State commissions could and did resolve disputes between ILECs and CLECs. A brief review of the regulatory changes which occurred in Maryland prior to the 1996 Act will demonstrate this fact.

Maryland began opening the local telephone service market to competition in 1993. On July 26, 1993, MFS applied for authority to become a local exchange service provider in the areas of Maryland served by Verizon. In addition, MFS petitioned the Commission to establish specific policies and requirements for the interconnection of competing local exchange networks. In setting the application for hearing, the Commission concluded that the proceeding should serve to establish generic policies and requirements for telecommunications carriers.

In Phase I, the Commission approved the unbundling of local exchange links and ports.[24] The Commission also granted MFS authority to provide telephone services in Maryland. Verizon was required to provide for interconnection with MFS. An interim interconnection rate also was established for local call termination on Verizon's network. In addition, MFS was permitted to file a tariff, with cost support, to establish a charge for the termination of calls on its own network. In Phase II, the Commission set

[24] *Re MFS Intelenet of Maryland, Inc.*, 85 Md. PSC 38 (April 25, 1994).

the rates, term and conditions for interconnection between the carriers.[25]

Maryland's experience with opening the local market to competition demonstrates that the 1996 Act was not a "benefit" but an unwarranted intrusion. Maryland's only "gains" under the 1996 Act were a loss of autonomy. Prior to the 1996 Act, Maryland had sole authority over its local exchange market. After the Congressional enactment, Maryland is now forced to share that authority with the FCC and can even be preempted by that agency. Certainly no reasonable person would interpret this outcome as a "benefit" or "gift" to Maryland. In actuality, all the benefits flowed to the FCC, which is permitted to usurp the State's traditional regulatory authority, and utilize State resources in implementing the 1996 Act.

Furthermore, participation by the States in the 1996 Act's regulatory scheme was not voluntary. Regulation of local exchange carriers traditionally has been within the police powers of the State. The telecommunications industry indisputably involves a quintessential "state interest" - the provision of telecommunications services to the citizenry at competitive rates-protection of which Congress cannot condition on a State's waiver of vital rights. Upon passage of the 1996 Act, a State was forced to either abide by the federal regulations or cede its power to regulate to the FCC (a classic Hobson's choice). The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that any court should perceive as voluntary.

The linchpin of the contention that the 1996 Act constitutes a "gift" is §252(e)(5). The Petitioners argued

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[25] *Re MFS Intelenet of Maryland, Inc.*, Phase II, 86 Md. PSC 467, 470-71 (Dec. 28, 1995).

below that this provision rendered the state's participation in the 1996 Act voluntary because the FCC would take over the responsibilities of any state who "chooses" not to participate. However, Petitioners interpretation of this section is overly broad and contrary to the plain meaning of that provision. Section 252(e)(5) states "if a State commission fails to act to carry out its responsibility under this section **in any proceeding or other matter** . . . the [FCC] shall issue an order preempting the State commission's jurisdiction **of that proceeding or matter** . . . and shall assume the responsibility of the State commission . . . **with respect to the proceeding or matter** . . . . "(emphasis added).

Clearly, this provision envisions the FCC assuming jurisdiction over discrete proceedings or matters, not taking over wholesale responsibility for telecommunications regulation in state. This conclusion is supported by the Joint Committee of Conference Report which described the Senate provision as requiring that the FCC "shall assume the responsibilities of the State in the **applicable proceeding or matter**." H.R. Conf. Rep. No. 104-458 (1996), reprinted in 1996 U.S.C.C.A.N. 124 (emphasis added) Congress could not have contemplated the FCC taking full responsibility for regulatory local service in the States. The reason the States are included in the 1996 Act is not "in the spirit of federalism" but because the federal government is incapable of regulating such a vast industry on its own. Essentially, Congress is using the States to implement a program that the federal government would be incapable of carrying out on its own.

More critically, the FCC severely undermined any "voluntary" aspect of a State's "opting in" by stating explicitly that, in assuming jurisdiction over a matter, "it shall not be bound by State laws and standards that would

have applied to the State commission in such proceeding or matter." 47 CFR §51.807(b). So much for "genuine choice."

Finally, several federal courts have held that they will not review interconnection agreements for violations of state law. *See, e.g., Illinois Bell v. WorldCom*, 179 F.3d 566, 571 (7th Cir. 1999). Thus, if a State commission had "opted out" of the 1996 Act, State law requirements would not even receive any consideration and parties who operate in violation of State law could do so with impunity.

The above are not "genuine choices" that fall within those limits articulated for a preemptible field in *FERC v. Mississippi*, 456 U.S. 742 (1982). The 1996 Act passed the "point of coercion" because the effect of Maryland's refusal to waive its immunity is the exclusion of the State from an otherwise lawful activity. *See, College Savings*, 527 U.S. at 687. Under the 1996 Act, a State has the choice of seeing its commission frozen out of effective enforcement of state-related service and interconnection issues, as well as federal matters under §§251 and 252, **or** the State is stripped of its immunity from federal judicial review. The States are thus denied that "dignity and respect" to which a sovereign State is entitled.

There is no arguable basis to conclude that the State's continued regulation of local telephone carriers is a "benefit" from Congress, which justifies constructive waiver of Eleventh Amendment immunity. This Court should hold that abrogation of Eleventh Amendment immunity as the price of "opting into" the scheme created in §252 is an invalid option in light of *Seminole* and *College Savings*. Therefore, the Commission's Eleventh Amendment immunity was not waived through its participation in §252 arbitration proceedings. The 1996 Act's requirement of federal district court review is unconstitutional.

B. This Proceeding Does Not Meet the Requirements of the *Ex parte Young* Exception

Verizon attempted to avoid the bar of Eleventh Amendment sovereign immunity by naming the Commission members individually in their official capacities. *See, Ex parte Young*, 209 U.S. 123 (1908). *Seminole* represents the first Supreme Court decision since *Ex parte Young* to hold that the Eleventh Amendment bars an action against a State official for purely prospective relief to prevent ongoing violations of federal law.

Relief under *Ex parte Young* may be foreclosed if the statute in question provides "a detailed remedial scheme," if that remedy is "significantly more limited than . . . the liability upon the state officer under *Ex parte Young*" and if Congress did not to "authorize federal jurisdiction under *Ex parte Young* over a causes of action with a limited remedial scheme." *Seminole*, 517 U.S. 44, 74-75 (1996).

The *Seminole* Court found that "where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole*, 517 U.S. at 74. This Court should find that the 1996 Act constitutes a comprehensive statutory scheme and thus the *Ex parte Young* doctrine does not apply.

In *Seminole*, after rejecting the tribe's abrogation argument, the Court turned to the tribe's alternative contention that *Ex parte Young* served as a means by which to obtain relief in federal court. The tribe contended that

federal court jurisdiction existed to proceed in an action against the Governor to obtain injunctive relief.

However, the *Seminole* Court held the *Ex parte Young* doctrine inapplicable. The Court reasoned that in contrast to the "modest set of sanctions" Congress established in the IGRA, a suit under *Ex parte Young* would expose the defendant State official to the "full remedial powers of a federal court." Also, allowing a suit for relief under *Ex parte Young* would render ineffective the remedies Congress designed. The Court acknowledged that Congress has authority to establish federal court jurisdiction over State officials comparable to *Ex parte Young* jurisdiction, but concluded that Congress had not applied such authority when it wrote the IGRA. Of significance, the Court ruled that even though Congress' remedial scheme under the IGRA did not work because it violated the State's Eleventh Amendment rights, the Court could not "rewrite the statutory scheme in order to approximate what we think Congress might have wanted." *Seminole*, 517 U.S. at 74-76.

The *Seminole Tribe* decision places an obligation on the federal courts to examine Congressional intent with respect to the scope of statutory remedies that may be available in any case where the *Ex parte Young* doctrine is asserted to remove the Eleventh Amendment bar. Application of the Supreme Court doctrine espoused in *Seminole* must lead to the conclusion that finding jurisdiction under *Ex parte Young* in this instance would be inappropriate. In *Seminole*, the Supreme Court found that when a statute implies that Congress intended an alternative, specific form of relief be available to enforce compliance with that statute, a court should infer that Congress did not intend the federal court to provide traditional *Ex parte Young* injunctive relief.

The Tenth Circuit recently applied the *Seminole* analysis to reach the conclusion that Titles IV and XX of the Social Security Act created detailed remedial schemes for enforcement. In *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), the Tenth Circuit noted that under Title IV the State's were required to adhere to a comprehensive set of statutory and regulatory standards imposing federally-defined objectives, administrative procedures and appeals. The Titles also provide for federal oversight of the plans by the Department of Health and Human Services ("HHS"). HHS has the authority to dictate the terms of the plan. States that fail to comply with the planning face a reduction in their funding eligibility. The Tenth Circuit held that the comprehensive statutory and regulatory provisions governing Titles IV and XX demonstrated that Congress meant to preclude reliance on the broad provisions of an *Ex Parte Young*, suit to enforce the federal statutory standards.

Applying the *Ingram* analysis to the 1996 Act, this Court must conclude that the 1996 Act is a detailed remedial scheme. The State commissions are required to adhere to a comprehensive set of statutory and regulatory standards imposing federally defined objectives and administrative procedures. *See*, §§252(b)(4), (c), (d), (e)(1) and (e)(2). The 1996 Act provides for federal oversight by the FCC. *See*, §251(d). Failure of a State commission to carry out its responsibility in a proceeding may result in the FCC preempting the State commission's jurisdiction over that proceeding. §252(e)(5).

Furthermore, the remedial scheme of the 1996 Act includes a federal court remedy to allow for a review of an interconnection agreement to determine whether the agreement complies with §§251 and 252. But this federal court remedy does not contemplate injunctive relief. In addition, the 1996 Act imposes no set of judicial sanctions

against a state commission for failure to timely adhere to the expedited timetable. Clearly, the federal court relief available under §252(e)(6) is far less onerous than the relief that would be available pursuant to an *Ex parte Young* suit. Section 252(e)(6) only allows for a review of an interconnection agreement whereas an *Ex parte Young* action against a state commission would expose the Commissioners to the full remedial powers of a federal court, including presumably, contempt sanctions. Thus, to allow an *Ex parte Young* action against the Commissioners would be to "rewrite the statutory scheme", render superfluous the limited statutory remedy provided under §252(e)(6) and would permit the plaintiff to obtain relief against the individual Commissioners that they could not otherwise obtain pursuant to §252(e)(6).

Any attempt to achieve jurisdiction through the *Ex parte Young* fiction rather than through a §252(e)(6) action will frustrate Congress' clear intent that the 1996 Act provides the ***exclusive*** remedies against the state commissions. Like the statute in *Seminole*, §252(e)(6) does not "stand alone" but was created in the context of a carefully crafted remedial scheme. Just as the *Seminole* Court refused to replace Congress' unconstitutional attempt to abrogate states' immunity with a judicially created remedy, so to should this Court refuse to apply *Ex parte Young* to the 1996 Act.

Another factor militating against use of *Ex parte Young* relief is the fact that Congress clearly intended for §252(e)(6) actions to proceed against State commissions, not individual commissioners.

In *Seminole*, the Court observed that the statute indicated that Congress clearly contemplated that the state would be the respondent and repeatedly referred to "the

State." *Seminole*, 517 U.S. at 75. According to the Court, where a statutory scheme unmistakably authorizes a State or its agency to act, as opposed to an individual State official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Id.* 75 n.17. Thus, the *Seminole* Court determined that absent explicit Congressional authorization, Courts should not permit the use of an *Ex parte Young* action to negate a state's sovereign immunity.

In *Seminole*, the Court looked to the federal statute at issue and determined that it was not Congress' intent to create a cause of action against the state officials, relying on a literal reading of the statute to support this analysis. Thus, in order to determine whether Verizon's action against the Commissioners may proceed, this Court is required to determine whether Congress intended to limit the availability of *Ex parte Young* suits over a cause of action brought under the 1996 Act.

In the 1996 Act, **all** of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and **none** of the provisions refer to individual State commissioners. Section 252(e)(6), the statutory provision relied upon by the plaintiffs to initiate this case, is entitled "Review of State Commission Actions". That heading alone implies that an appeal will be filed against the State Commission. Section 252 refers forty-five times to the "state commission" with four such references contained in the subsection headings. See, 47 U.S.C. §§252(b)(4)(e), (e)(6), and (f)(2). Section 252 never refers to individual state commissioners. This overwhelmingly demonstrates that Congress designed the §252(e)(6) action to proceed against the **State commission**.[26]

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[26] In fact, the actions Verizon complained of could not be accomplished by any of the five Commissioners acting alone. The Commission only can act by majority vote on such a matter. It is the action of the Commission as an entity that is required under the 1996 Act as a

It is illogical to infer that Congress intended to subject State commissioners to broad federal injunctive relief and contempt powers. Congress would have expressly provided for such a significant remedy had it intended to do so. Thus, the district court was without jurisdiction to proceed against the individual commissioners.

The Congressional remedy crafted into the 1996 Act does not authorize a suit against a state official as required by *Seminole,* 517 U.S. at 75. Congress' remedial scheme does not include State commissioners as parties to actions brought under §252(e)(6). "When Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and that such limitations as they may embody are not to be circumvented . . . " *McDonnell v. Cisneros*, 84 F. 3d 256, 261 (7th Cir. 1996). The fact that Congress created on unconstitutional remedy, which allowed for suit against the state does not change this result.

This Court should find that, pursuant to the rule espoused in *Seminole*, Congress did not provide for the type of relief available under *Ex parte Young* in the 1996 Act.

Another critical limitation on the *Ex parte Young* doctrine is that a State officer must have exceeded his authority in order to be subjected to an *Ex parte Young* suit. As the Court explained in *Larson v. Domestic & Foreign Comm. Corp.* 337 U.S. 682 (1949), an *ultra vires* claim exists on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient" *Pennhurst,* 465 U.S. at 101 n. 11 (quoting *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 690 (1949)). Thus, mere assertions of good faith error in the

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prerequisite to judicial review by this Court, not the actions of the individual Commissioners.

exercise of lawful authority, such as Verizon's contention that the Maryland Commission misinterpreted the FCC Order, do not support an action under *Ex parte Young*.

Verizon's suit falls well beyond the ambit of the *Ex parte Young* paradigm. The Maryland commissioners are not alleged to have violated any constitutional provisions, nor are they alleged to have exceeded the scope of their authority under the 1996 Act. Verizon did not contend that the commissioners failed to perform a mandatory duty nor interpreted or applied state law in a manner contrary to the United States Constitution or federal law. Verizon must concede that the Maryland Commission was empowered to consider its dispute, Verizon itself selected the initial forum. Thus, there can be no contention that the commissioners have acted on a matter that is outside their jurisdiction. Because a claim of error in the exercise of lawful authority is not sufficient to strip the Commissioners of their sovereign immunity, Verizon's suit is barred by the Eleventh Amendment. *Pennhurst,* 464 U.S. at 101 n. 11. (quoting Larson, 337 U.S. at 690).

III. THIS COURT SHOULD UPHOLD THE FOURTH CIRCUIT'S APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), the Supreme Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. In 1983, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), clarifying *Rooker* and giving the *Rooker-Feldman* doctrine its name. In *Feldman,* the

Supreme Court held that lower federal courts have no jurisdiction to hear "challenges to State court decisions in particular cases arising out of judicial proceedings", *Id.* at 486, or decide questions "inextricably intertwined" with State court judgments. *Id.* at 483 n. 16.

The *Rooker-Feldman* doctrine is founded on two main inferences derived from provisions of Title 28 of the United States Code. The first inference is that 28 U.S.C. §1257, which gives the Supreme Court appellate review of certain State court decisions, is the only federal statute that explicitly provides for federal review of State court decisions. Congress granted original jurisdiction to federal district courts under a variety of statutes, including 28 U.S.C. §§1331 and 1332. Under this statutory scheme, federal district courts are courts of original, not appellate jurisdiction. Thus, by inference, 28 U.S.C. §1257 granted jurisdiction exclusively to the Supreme Court to review final judgments or decrees from the highest court in a state. The second inference is that Congress intended to foreclose all other forms of federal court review of State decisions. Because Congress only gave the Supreme Court the explicit authority to review the decisions of a state court, Congress meant to deny all other federal courts that power.

Thus, the *Rooker-Feldman* doctrine is an extension of the principle that federal courts are courts of limited jurisdiction. Also underlying the *Rooker-Feldman* doctrine is the idea of federalism. The doctrine is designed to preserve the two distinct legal systems so that each may proceed independently of the other with the Supreme Court as the final arbiter of any federal questions raised in either system. The policy reasons which underlies the doctrine apply just as readily to state agency decisions rendered in quasi-judicial proceedings as they do to State court decisions.

As noted earlier, the *Feldman* Court found that the federal district court was "without authority to review final determinations of the [D.C. Court] in judicial proceedings. Review of such determinations can be obtained only in this Court. *See*, 28 U.S.C. §1257." *Feldman,* 460 U.S. at 476. In reaching this conclusion, the Supreme Court analyzed the crucial question whether the proceedings before the D.C. Court "were judicial in nature" so as to bring these proceedings under the ambit of *Rooker*.

Interestingly, the leading case relied upon by the *Feldman* Court was *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), where the Supreme Court acknowledge that the Virginia State Corporation Commission is, at least for some purposes, a court. 211 U.S. at 224. *Prentis* also held that:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

211 U.S. at 226. The *Feldman* Court agreed with the *Prentis* finding that the question regarding whether a proceeding is judicial in nature "depends not upon the character of the body but upon the character of the proceedings." 460 U.S. at 477. The *Feldman* Court found that the proceedings at issue were judicial in nature because the tribunal "was called upon to **investigate, declare and enforce** liabilities as they stood on present or past facts and under laws supposed already to

exist." *Feldman*, 460 U.S. at 479. (emphasis added) Consequently, the *Feldman* Court ruled that the district court lacked subject matter jurisdiction over applicants' claims for individual relief.

This Court has recognized that it is "within the power of the States, as it is within the power of the Federal Government, to transfer some adjudicatory functions to administrative agencies, with the opportunity for subsequent judicial review." *Printz v. United States,* 521 U.S. 898, 929 n.14 (1997) (citing *Crowell v. Benson*, 285 U.S. 22 (1932)) Similarly, as noted above, this Court has established that an administrative agency engaged in adjudication is performing a judicial act. *See, Prentis v. Atlantic Coast Line Co.*, 211 U.S. at 224-26. The proposition that State agencies perform judicial acts was the very premise of *FERC v. Mississippi,* 456 U.S. 742, 760-61 (1982), which held that *Testa v. Katt,* 330 U.S. 386 (1947), requires a State administrative agency to apply federal law when it adjudicates disputes arising within its jurisdiction. *See*, 456 U.S. at 760.[27]

The MDPSC clearly functions as a Court in some circumstances. The Maryland Commission has the powers of a court of record to administer oaths, compel the attendance of witnesses and production of documents and enforce compliance with its orders through fines and other penalties as prescribed or authorized by law. *PUC* §§3-104, 3-109, 3-110, 3-111, 10-402. Finally, like other Courts, the Maryland Commission must afford all parties reasonable notice of proceedings, an opportunity to be heard, and the opportunity to present evidence. *PUC* §§3-102, 3-103, 3-107.

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[27] *See, also, Printz,* 521 U.S. at 929 n. 14. ("We have no doubt that *FERC* would not have been decided the way it was if *non* adjudicative responsibilities of the state agency were at issue").

The Maryland Commission, a State administrative agency with longstanding expertise in the regulation of local telephone service, exercised the judicial power granted it under Maryland law when it adjudicated Verizon's Request for a Declaratory Order. The proceeding which resulted in the MDPSC Order at issue was, in every sense, an exercise of judicial power. It commenced when Verizon filed a request for declaratory order, included a prehearing conference, intervention and participation by fifteen parties and a full hearing. The proceeding culminated with the Maryland Commission's adjudication of the rights of the parties under pre-existing interconnection agreements and in arbitrations currently before the MDPSC.

In the proceedings before the Maryland Commission, the Maryland Commission investigated facts, conducted an adversarial hearing, declared its conclusions and enforced liabilities against a specific party as they stood on present facts and under laws that already existed. Given the general principles discussed above, the Maryland Commission must be found to have acted in a judicial capacity. See, e.g. *Ohio Civil Rights Comm'n v. Dayton Christian Schools,* 477 U.S. 619 (1986) (state civil rights commission proceedings deemed "judicial" in nature.)

Petitioners' reliance on *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997) is misplaced. Contrary to the United States' assertion, this Court did not find that general statutory language is sufficient to confer jurisdiction over suits challenging the decisions of a State agency as contrary to federal law. *City of Chicago* merely held that federal district courts can exercise supplemental jurisdiction over State claims that call for deferential on-the record review of a State administrative order when the court already possesses original jurisdiction over another claim. In *City of Chicago,* the district court

exercised original jurisdiction over the federal constitutional claims, which were not bound by the administrative record. 118 SCt. at 531.

The Rooker-Feldman doctrine advances the policy of preserving the autonomy of both sovereigns and preventing undue incursions of one upon the other. In applying the *Rooker-Feldman* doctrine, the Fourth Circuit recognized the judicial nature of the proceedings involved and properly found that the concept of federalism inherent in our system requires the federal district court to refrain from taking jurisdiction over this case.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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Nos. 00-1531 and 00-1711

In the Supreme Court of the United States

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent Public Service Commission of Maryland, et al. (MPSC) does not seriously dispute that Verizon's claims in this case "aris[e] under the * * * laws * * * of the United States" within the meaning of 28 U.S.C. 1331. See MPSC Br. 12 & n.11. Nor can that fact be disputed. The underlying complaint asserts that MPSC construed and enforced Verizon's interconnection agreement with WorldCom in a manner prohibited by the Telecommunications Act of 1996 (1996 Act) and the

FCC's orders pursuant to the 1996 Act. Verizon Pet. App. 7a. It is well settled that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute, which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983).

MPSC offers only a cursory defense (Br. 15) of the court of appeals' principal rationale for rejecting Verizon's invocation of the district court's jurisdiction under 28 U.S.C. 1331—namely, that 47 U.S.C. 252(e)(6), which expressly recognizes the district courts' jurisdiction to review state commission "determinations" under the 1996 Act, deprives the district courts, by negative implication, of jurisdiction to review any state commission "determinations" that may be outside its scope.[1] As previously explained, however, nothing in Section 252(e)(6) states, or even suggests, any limitation on the jurisdiction that the district courts otherwise possess under Section 1331 with respect to claims arising under federal law. See U.S. Opening Br. 21-24. Although MPSC also attempts (Br. 42-47) to sustain the court of appeals' rejection of Section 1331 jurisdiction based on the *Rooker-Feldman* doctrine, that doctrine applies only to challenges to the decisions of state courts, and thus has no application to decisions of state regulatory commissions. See U.S. Opening Br. 25-26.

MPSC devotes most of its brief to questions that are not before the Court in this case. The Court granted certiorari solely on the question "[w]hether a federal district court has subject-matter jurisdiction under

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[1] All citations of provisions of the 1996 Act are of Supp. V 1999.

28 U.S.C. 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act." U.S. Pet. (I); see also Verizon Pet. (I). That question is analytically distinct from the questions whether a carrier has a private right of action to challenge state commission orders that violate the 1996 Act (see MPSC Br. 11-25) or whether a state commission or its commissioners may be named as defendants in such an action, consistent with principles of sovereign immunity, even if the action may proceed against other parties (see MPSC Br. 26-42). As for the first of those questions, it has long been understood that a party has a federal cause of action for declaratory and injunctive relief against state officials who are alleged to have exercised their authority in a manner contrary to controlling federal law. See pp. 8-9, *infra*. As for the sovereign immunity question, the Court granted certiorari on that question in *Mathias* v. *Worldcom Technologies, Inc.*, No. 00-878, and the United States has addressed the question in that case. See U.S. Br. at 29-49, *Mathias*, *supra*.

I. MPSC CONFLATES THE QUESTION WHETHER SUBJECT-MATTER JURISDICTION EXISTS UNDER 28 U.S.C. 1331 WITH THE QUESTION WHETHER A PRIVATE RIGHT OF ACTION EXISTS TO ENFORCE THE 1996 ACT

A. MPSC initially contends that "the 1996 Act does not create a private cause of action." MPSC Br. 11 (capitalization omitted). That contention, which is addressed on its merits below (pp. 8-10), is irrelevant to whether district courts possess subject-matter jurisdiction under 28 U.S.C. 1331 to adjudicate cases such as this one. "It is firmly established in [the Court's] cases that the absence of a valid (as opposed to arguable)

cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); see also, *e.g.*, *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) ("[w]hether a cause of action exists is not a question of jurisdiction"); *Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979). Accordingly, the Court need not be detained by MPSC's extended discussion (Br. 11-25) of whether Congress expressly or implicitly provided carriers with a private cause of action to enforce the 1996 Act.

MPSC's error in conflating the separate questions of whether subject-matter jurisdiction exists (the question on which the Court granted certiorari) and whether a private cause of action exists (a question not previously addressed in this case) infects much of its brief. For example, MPSC devotes fully six pages (Br. 13-18) to a discussion of whether a carrier's claim that a state commission has construed or enforced an interconnection agreement in a manner contrary to federal law satisfies the test announced in *Cort* v. *Ash*, 422 U.S. 66 (1975). But *Cort* v. *Ash* and its progeny concern whether a private right of action may be inferred from a federal statute or constitutional provision that does not expressly provide one. Those cases have nothing to do with a district court's jurisdiction, expressly granted by 28 U.S.C. 1331, to decide cases arising under federal law.

MPSC's error is also evident in its discussion (Br. 20-22) of *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). In that case, a union brought suit in federal district court against a city and a private transit company. The union claimed that the defendants had violated Section

13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. App. 1609(c) (1982), which required that transit workers' collective-bargaining rights be protected when a state or local government received federal funds to acquire a transit company. The district court held that it lacked subject-matter jurisdiction over the case. The Sixth Circuit reversed, holding, first, that there was "subject-matter jurisdiction under 28 U.S.C. § 1331, because the union's claim arose under the laws of the United States," and, second, that the union stated a cause of action under UMTA. *Jackson Transit*, 457 U.S. at 19. This Court "agree[d] with the Court of Appeals that, strictly speaking, the District Court had jurisdiction under 28 U.S.C. § 1331 to hear the union's suit," because "[t]he complaint alleged a violation of the § 13(c) agreement required by the UMTA and of the subsequent collective-bargaining agreement contemplated by the Act, and prayed for relief under federal law." *Id.* at 21 n.6. The Court went on to hold, however, that the union's contract action was not a federal cause of action. *Id.* at 21-29. *Jackson Transit* thus confirms that the jurisdictional question is separate from, and antecedent to, the question whether a federal cause of action exists. MPSC seeks (Br. 21) to dismiss *Jackson Transit* as "merely" involving the district court's "jurisdiction to determine whether the union had a cause of action." But that is precisely what subject-matter jurisdiction is.

B. MPSC mistakenly characterizes (Br. 23) as "unprecedented" and "novel" the proposition that "under § 1331 federal district courts can hear virtually any claim unless Congress has expressly barred the court from hearing that claim." With respect to claims arising under federal law (which are the only claims that Verizon has asserted in this case), that proposition is

confirmed by decades of precedent of this Court and the lower federal courts. This Court has consistently understood Congress to have meant what it said in 28 U.S.C. 1331 when it vested the district courts with jurisdiction over "all civil actions arising under the * * * laws * * * of the United States" (subject in earlier times to a monetary floor). See, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486, 515 (1969) ("[I]t has generally been recognized that the intent of the drafters [of Section 1331] was to provide a broad jurisdictional grant to the federal courts."); *Bankers Trust Co.* v. *Texas & Pac. Ry.*, 241 U.S. 295, 305 (1916) (describing the statutory predecessor to Section 1331 as a "broad[] exercise[]" of Congress's constitutional authority to prescribe the jurisdiction of the lower federal courts). It would be contrary to the expansive text of Section 1331—as well as to the purpose that it reflects of presumptively providing a federal forum for any cause of action arising under federal law—if courts were to recognize exceptions that Congress has not provided expressly or by the clearest implication. See, *e.g.*, *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-494 (1991); cf. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

No such exception can be derived from 47 U.S.C. 252(e)(6), which states that "any party aggrieved by" a state commission's determination under Section 252 "may bring an action in an appropriate Federal district court to determine whether the agreement * * * meets the requirements of section[s] 251 [and 252]." See U.S. Opening Br. 21-22. Section 252(e)(6) is most sensibly understood as confirming the district courts' jurisdiction to consider all claims that a state commis-

sion has acted contrary to Sections 251 and 252 (and the FCC's implementing rules) with respect to an interconnection agreement, whether the claim arises when the state commission approves or rejects the agreement or subsequently when the commission resolves a dispute about its meaning or effect. See U.S. Br. 16-29, *Mathias*, *supra*. In any event, Section 252(e)(6) does not purport to deprive the district courts of any jurisdiction they otherwise possess under Section 1331 with respect to claims arising under federal law. Any possible doubt on that score is resolved by Congress's directive in the 1996 Act that its provisions "shall not be construed to modify, impair, or supersede Federal * * * law unless expressly so provided." Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (*reprinted in* note following 47 U.S.C. 152).[2]

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[2] MPSC cites (Br. 20) four district court cases as having "found that jurisdiction is limited to the 1996 Act," and thus presumably cannot be based on other jurisdictional grants such as 28 U.S.C. 1331. None of those cases even suggests, much less holds, that a district court lacks jurisdiction under 28 U.S.C. 1331 (or, for that matter, 47 U.S.C. 252(e)(6)) in the circumstances of this case. One case holds, contrary to MPSC's position, that 47 U.S.C. 252(e)(6) confers jurisdiction on the district courts to decide issues of federal law that arise in the interpretation of previously approved interconnection agreements. *Michigan Bell Tel. Co.* v. *MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 817, 823-824 (W.D. Mich. 1998). The court therefore concluded that "it need not determine whether Section 1331 also supports federal jurisdiction." *Id.* at 824. Another of the cases cited by MPSC does not address jurisdiction at all, but instead addresses whether a private right of action exists under 47 U.S.C. 254, a provision of the 1996 Act that is not at issue in this case (or in *Mathias*). *Utility Reform Network* v. *California Pub. Utils. Comm'n*, 26 F. Supp. 2d 1208 (N.D. Cal. 1997). The two remaining cases simply hold that a district court does not have jurisdiction under 47 U.S.C. 252(e)(6) to address matters that have not yet been decided by the state commission.

C. Although the question is not presented in this case, a carrier has a federal cause of action for declaratory and injunctive relief against the enforcement of a state commission order that violates the 1996 Act. See *AT&T* v. *Iowa Utils Bd.*, 525 U.S. 366, 379 n.6 (1999) (observing that the 1996 Act leaves "no doubt" that "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel").

First, the carrier may be viewed as asserting a claim for equitable relief under the Supremacy Clause and the federal jurisdictional statutes on the ground that an Act of Congress preempts a state regulatory action. The district courts routinely adjudicate such claims without requiring a specific statutory right of action, and this Court has reviewed such claims on the merits. See, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 371 (2000) (claim that state statute "unconstitutionally infringed the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by [a] federal Act"); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992) (claim that state regulation was preempted by federal statute); *Shaw* v. *Delta Air Lines*, 463 U.S. at 96 n.14 (1983) (noting that "[t]his Court, of course, frequently has resolved pre-emption disputes" in this posture); *Ex parte Young*, 209 U.S. 123 (1908); see also, *e.g.*, *Guaranty Nat'l Ins. Co.* v. *Gates*, 916 F.2d 508, 512 (9th Cir. 1990) ("the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution

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Indiana Bell Tel. Co. v. *McCarty*, 30 F.Supp.2d 1100, 1103-1104 (S.D. Ind. 1998); *GTE N.W., Inc.* v. *Nelson*, 969 F. Supp. 654 (W.D. Wash. 1997).

or laws") (quoting 13B Charles A. Wright, et al., *Federal Practice and Procedure* § 3566, 102 (1984)); *Western Air Lines, Inc.* v. *Port Auth.*, 817 F.2d 222, 225-226 (2d Cir. 1987). Several Members of the Court have expressly addressed the existence of such a cause of action. See, *e.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.) (a plaintiff may vindicate a federal preemption claim "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," regardless of whether the plaintiff "can show the deprivation of a right, privilege, or immunity secured by federal law" that would entitle him to other relief) (citing 28 U.S.C. 1331, 2201, 2202).

Alternatively, a carrier could be viewed as having a private right of action under either the 1996 Act, or under 42 U.S.C. 1983 (as to state defendants) and 47 U.S.C. 207 (as to carrier defendants), to seek declaratory and injunctive relief from a state commission order that violates the 1996 Act. See *Suter* v. *Artist M.*, 503 U.S. 347, 355-356 (1992) (Section 1983 inquiry turns on whether a statute "create[s] enforceable rights" and does not "foreclose [their] enforcement" under Section 1983); *id.* at 363-364 (implied right of action inquiry turns on "whether Congress intended to create the private remedy sought by the plaintiffs"); see also *Blessing* v. *Freestone*, 520 U.S. 329, 346 (1997) (noting that burden falls on state defendant to "make the difficult showing that allowing § 1983 actions to go forward * * * 'would be inconsistent with Congress' carefully tailored scheme'"). Section 251 of the 1996 Act imposes reciprocal duties, and thus confers reciprocal rights, on carriers as parties to interconnection agreements. See 47 U.S.C. 251(a)-(b) (prescribing

"duties" of "[e]ach telecommunications carrier" and "[e]ach local exchange carrier"); 47 U.S.C. 251(c) (prescribing additional "duties" of "each incumbent local exchange carrier"). Section 252 provides for those duties and rights to be enforced in the first instance by a state commission or, if it elects not to exercise that authority, by the FCC. See 47 U.S.C. 252(a)-(e). Congress plainly intended for those duties and rights ultimately to be enforceable in federal court. Indeed, Section 252(e)(6) expressly provides that "any party aggrieved by [a] determination" of a state commission under Section 252 "may bring an action in an appropriate Federal district court." 47 U.S.C. 252(e)(6). And, whether or not the Court construes Section 252(e)(6) in *Mathias* as directly encompassing district court review of orders enforcing existing interconnection agreements, Section 252(e)(6) does not evince any affirmative congressional intent to foreclose such review.[3]

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[3] In arguing to the contrary, MPSC notes (Br. 16) that an earlier version of the 1996 Act expressly provided a private right of action. That provision, contained in Section 257(c) of the original Senate bill, would have made a cause of action *for damages* available to "any person who is injured in its business or property by violations" of the local-competition requirements or an interconnection agreement. S. Rep. No. 23, 104th Cong., 1st Sess. 105 (1995). Such a right of action would have been considerably more expansive than the right of action addressed in the text here. Accordingly, even if the omission of Section 257(c) could be viewed as an expression of congressional disapproval of the particular cause of action for damages that it would have provided, it could not be viewed as an expression of congressional disapproval of the cause of action for declaratory and injunctive relief asserted by Verizon in this case.

II. MPSC CONFLATES THE QUESTION OF SUBJECT-MATTER JURISDICTION UNDER 28 U.S.C. 1331 WITH THE QUESTION OF SOVEREIGN IMMUNITY

MPSC next contends that "the Eleventh Amendment mandates that this case be dismissed," either because MPSC "has not waived its sovereign immunity" or because "this proceeding does not meet the requirements of the *Ex parte Young* exception." MPSC Br. 26, 36 (capitalization omitted). No question of sovereign immunity, however, is before the Court in this case.

The court of appeals addressed the question of subject-matter jurisdiction under 28 U.S.C. 1331 separately from the question of sovereign immunity. Compare Verizon Pet. App. 47a-50a (discussing jurisdiction under Section 1331) with *id.* at 8a-30a (discussing sovereign immunity). As the court of appeals recognized (*id.* at 29a- 30a), the Section 1331 question concerns whether district courts may exercise jurisdiction over claims that a state commission order construing an interconnection agreement violates the 1996 Act, even if the plaintiff names as defendants only the other parties to an agreement, and not the state commission or commissioners.

The petitions for certiorari filed by the United States and Verizon sought the Court's review on four questions, two of which challenged the court of appeals' rulings on subject-matter jurisdiction and two of which challenged its rulings on sovereign immunity. See U.S. Pet (I) (questions presented); Verizon Pet. (I) (questions presented). The Court granted certiorari only on the question of subject-matter jurisdiction under Section 1331. The Court had already granted certiorari on the same sovereign immunity questions in the

Mathias case, and the United States has addressed those questions in that case. See U.S. Br. at 29-49, *Mathias*, *supra*.[4]

III. THE ROOKER-FELDMAN DOCTRINE DOES NOT BAR SUBJECT-MATTER JURISDICTION OVER THIS CASE

MPSC finally contends (Br. 42-47) that the *Rooker-Feldman* doctrine precludes a district court from exercising jurisdiction over a suit challenging the decision of a state commission under the 1996 Act. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). As previously explained, the *Rooker-Feldman* doctrine has no application to this case. See U.S. Opening Br. 25-26. That doctrine is designed to prevent litigants from circumventing 28 U.S.C. 1257, which provides for review in this Court of decisions of the highest state court, by seeking review of such decisions in the lower federal courts. No circumvention of 28 U.S.C. 1257 occurs where, as here, the underlying dispute has not been presented to the state courts. Nor is it relevant for present purposes that MPSC might be viewed as having acted in a "quasi-judicial" capacity in this case. Such an inquiry is conducted under the *Rooker-Feldman* doctrine only in assessing whether

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[4] Since the filing of the United States' brief in *Mathias*, those questions have been addressed by another court of appeals. See *MCI Telecomms. Corp.* v. *Bell Atl.-Pa.*, No. 00-2257, 2001 WL 1381590 (3d Cir. Nov. 2, 2001). The Third Circuit, consistent with all of the courts of appeals that have addressed those questions with the exception of the Fourth Circuit, held that the Eleventh Amendment does not bar suits against state commissions or their commissioners seeking review of their orders for compliance with the 1996 Act.

the act of the highest state court is a judicial act, and thus one that could be reviewed in this Court, as opposed to a legislative, administrative, or ministerial act. See, *e.g.*, *Feldman*, 460 U.S. at 476-482. It is not conducted to determine whether a regulatory entity, which plainly is *not* a state court, should be treated as one for purposes of 28 U.S.C. 1257.[5]

Moreover, Congress has expressly made at least some decisions of state commissions under Sections 251 and 252 reviewable in district court. 47 U.S.C. 252(e)(6). Indeed, Congress has made the district courts the exclusive forum for seeking review of state commission decisions approving or rejecting interconnection agreements as an initial matter. See 47 U.S.C. 252(e)(4). Congress thus should be presumed to have concluded that such review may occur consistently with 28 U.S.C. 1257. MPSC offers no reason to surmise that district court review does not offend the *Rooker-Feldman* doctrine when the state commission order concerns a new interconnection agreement—a circumstance in which MPSC concedes (Br. 15) Congress provided for such review—but somehow does offend the *Rooker-Feldman* doctrine when the state commission order concerns a previously approved agreement.

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[5] Similarly, the Anti-Injunction Act, 28 U.S.C. 2283. which prohibits district courts (with certain exceptions) from "grant[ing] an injunction to stay proceedings in a State court," has been recognized not to apply to state regulatory commissions. See, *e.g.*, *Entergy, Arkansas, Inc.* v. *Nebraska*, 210 F.3d 887, 900-901 (8th Cir. 2000) (noting that "every circuit to have addressed the question [whether 28 U.S.C. 2283 applies to state administrative proceedings] has held that it does not") (citing cases); *Bud Antle, Inc.* v. *Barbosa*, 45 F.3d 1261, 1271 (9th Cir.) (citing cases), cert. denied, 515 U.S. 1159 (1995); cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 573 n.12 (1973) (declining to address the question).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for further proceedings, which may, if appropriate, include further consideration in light of the Court's decision in *Mathias* v. *Worldcom Technologies, Inc.*, No. 00-878.

Respectfully submitted.

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NOVEMBER 2001

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IN THE

Supreme Court of the United States

VERIZON MARYLAND INC., and
UNITED STATES OF AMERICA,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC IN SUPPORT OF PETITIONERS

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF RESPONDENTS MCI WORLDCOM, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

Respondents MCI WORLDCOM, Inc., and MCImetro Access Transmission Services LLC (collectively "WorldCom") demonstrated in their opening brief and in WorldCom's brief in the companion case, *Mathias v. WorldCom Technologies, Inc.*, No. 00-878 (U.S. filed September 10, 2001), that federal courts have jurisdiction under 28 U.S.C. § 1331 to consider whether a state public utility commission has violated federal law in interpreting or enforcing an interconnection agreement entered into pursuant to the Telecommunications Act of 1996 (the "1996 Act" or "Act"). The arguments in response by the Public Service Commission of Maryland ("MPSC") and *amici curiae* the

Virginia State Corporation Commission ("VSCC") and the Illinois Commerce Commission ("ICC") are without merit.

Bedrock principles of federal jurisdiction confirm that federal courts may adjudicate claims that state commission decisions interpreting and enforcing interconnection agreements violate the 1996 Act or applicable FCC regulations. The state commissions' arguments against the existence of a private right of action are off-point for two reasons: (1) they confuse the jurisdictional inquiry with the existence of a right of action, and (2) they incorrectly assume that a right to sue under section 1331 to enforce the 1996 Act could only be created by the Act itself.

On the other hand, Verizon goes too far – and well beyond the scope of the Court's grant of review – in contending that "Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law." Verizon Br. at 20; *see id.* at 12. The Court should not accept Verizon's invitation to address the merits of its claim that a misinterpretation of an interconnection agreement by a state commission necessarily violates the 1996 Act. The sole question presented in this case is whether there is federal jurisdiction to entertain a claim that a state commission's enforcement decision violated the Act, not the merits question whether Verizon actually articulated a valid federal claim. But if the Court chooses to reach Verizon's additional arguments about the *scope* of federal jurisdiction in enforcement cases, it should reject them.

I. Federal Courts Have Jurisdiction to Address Claims that State Commission Determinations Violate Federal Law.

The MPSC and its supporting *amici* do not even attempt to counter the fundamental premise of WorldCom's jurisdictional argument: that federal question jurisdiction exists over Verizon's claims because "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)); WorldCom Br. at 16-22. Instead, they argue that federal question jurisdiction does not exist under section 1331 because the 1996 Act does not create a private right of action, either express or implied, for challenges to state commission enforcement orders. That approach is faulty for two reasons.

First, whether courts have subject matter jurisdiction – the only question presented here – is a threshold question separate from and antecedent to the question whether the plaintiff has a cause of action. *Steel Co.*, 523 U.S. at 89; *Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 21 n.6 (1982). Here, to the extent that Verizon asserted non-frivolous claims to relief predicated on a specific interpretation of federal law, federal question jurisdiction exists under section 1331.

Second, as to the right of action issue, the MPSC incorrectly presumes that any right of action must be created

by the 1996 Act itself.[1] That is not the case. A carrier seeking injunctive relief on the ground that a state commission order is inconsistent with federal law has a private right of action both directly under the Supremacy Clause of the United States Constitution and under 42 U.S.C. § 1983. There is thus no reason to invoke "implied right of action" case law in this context. Moreover, even if *federal* law did not provide a clear right to seek judicial relief to bring state officials into compliance with federal law, state law would resolve any right of action issue in this context. As the MPSC acknowledges, MPSC Br. at 24, state administrative review procedures give carriers a right of action to challenge state commission orders enforcing interconnection agreements in state court. When the claims at issue are predicated on federal law, that same state-law-based review action may be brought to federal court under section 1331. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8-10 (1983).

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[1] In its *Mathias* brief, WorldCom has shown that section 252(e)(6) of the Act grants jurisdiction and provides an express right of action for federal court review of a state commission determination enforcing an interconnection agreement. Br. of WorldCom at 22-28, *Mathias v. WorldCom Techs., Inc.*, No. 00-878. WorldCom has also shown, however, that resolution of the section 252(e)(6) question in *Mathias* is not necessary to determine whether jurisdiction exists under section 1331. *Id.* at 15-22. Thus, because the question presented here does not directly implicate section 252(e)(6), WorldCom will assume, for purposes of this reply brief, that section 252(e)(6) does not apply. Nevertheless, if the Court reaches the section 252(e)(6) issue in *Mathias* and concludes that it provides a cause of action in enforcement cases, the present discussion of private rights of action would be unnecessary.

A. The MPSC's Argument Inverts the Jurisdictional Inquiry.

The thrust of the MPSC's argument is that federal courts must *first* determine whether the plaintiff's complaint states a cognizable federal cause of action and *then* discern whether federal question jurisdiction exists. MPSC Br. at 11-22. That formulation has it backwards. Subject matter jurisdiction is a "threshold matter" which courts must address before determining whether the plaintiff has a valid cause of action. *Steel Co.*, 523 U.S. at 94-95; *id* at 89-90 ("jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover"); *Jackson Transit*, 457 U.S. at 21 n.6 (where complaint claims violation of federal law, courts have subject matter jurisdiction to determine whether cause of action exists under that federal law).

In undertaking that threshold inquiry, the court "must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946). Stated somewhat more precisely, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co.*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. at 685); *see generally* WorldCom Br., Nos. 00-1531, 00-1711, at 16-19.

Under that standard, the federal district court had jurisdiction to entertain Verizon's complaint, which expressly alleged that both the 1996 Act and the FCC's implementing regulations insulated Verizon from having to

pay reciprocal compensation for calls to Internet Service Providers ("ISPs"). Compl. ¶¶ 3, 4, 5, 25, 31-32, 35. Clearly, Verizon raised meritorious claims if and only if the 1996 Act and the FCC regulations were given the construction it proposed. That is all that is required to invoke section 1331.[2]

B. Carriers Have a Private Right of Action to Challenge State Commission Enforcement Orders Under the Supremacy Clause, Section 1983, and State Law.

Carriers asserting claims like those of Verizon do have a right of action in federal court, derived from both federal and state law.

1. The Supremacy Clause

Verizon's complaint asserts a straightforward claim of preemption actionable under the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2. This

[2] This is not to say that Verizon's claims were actually meritorious. In its effort to counter the MPSC's conclusion that Verizon had validly agreed to pay compensation for ISP calls, Verizon relied on FCC regulations limiting reciprocal compensation to "local traffic" and on an FCC ruling that ISP calls are not "local traffic." As Verizon acknowledges, however, that FCC ruling was later vacated by the D.C. Circuit. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). On remand, the FCC dropped its use of the term "local traffic" as the touchstone for determining whether calls are subject to reciprocal compensation, adopting an entirely different statutory analysis based on 47 U.S.C. § 251(g). *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151 (2001). That new ruling, which does not purport to interfere retroactively with interconnection agreements containing promises to pay reciprocal compensation for ISP calls (like the promise the MPSC found to exist here), is being challenged in the D.C. Circuit.

Court has never required that such preemption claims be expressly authorized by an act of Congress. Rather, preemption claims are actionable directly under the Supremacy Clause and do not require a separate statutory cause of action under the federal law at issue. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 387-88 (2000); *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 501-02 (1984). *Accord, Western Air Lines, Inc. v. Port Auth. of N.Y. and N.J.*, 817 F.2d 222, 225-26 (2d Cir. 1987) (citing *White Mountain Apache Tribe v. Williams*, 810 F.3d 844, 847 (9th Cir. 1987)). In *Crosby*, for example, the Court sustained a preemption action directly under the Supremacy Clause where a state statute was inconsistent with the provisions of a federal appropriations act that delegated certain rights and duties to the President – a statute that clearly did not create any private right of action itself. 530 U.S. at 387-88. Thus, regardless of whether the 1996 Act creates a private right of action, Verizon has a right of action under the Supremacy Clause to seek declaratory and injunctive relief against state commission orders that Verizon claims were contrary to, or preempted by, federal law.

Although the MPSC contends that a right of action arises only if a federal statute totally precludes state regulation of the matter being litigated, MPSC Br. at 19, that is not the law. Preemption can and does occur where Congress has allowed some state regulation while enacting particular requirements that states are obligated to respect. That kind of "conflict" preemption is treated no differently than "field" preemption. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). The *scope* of Congress's preemption of state regulation cannot logically affect a party's right to ask the federal courts for redress when states

enact regulations barred by federal law.[3] Put differently, the fact that states were authorized to do some things in a given area should not affect the remedies available when they do something else that is prohibited. As this Court has explained, "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing cases).

2. Section 1983

Even without regard to the Supremacy Clause, Verizon has a private right of action for declaratory and injunctive relief under 42 U.S.C. § 1983. Section 1983 provides a plaintiff with a private right of action against any person who, under color of state law, deprives the plaintiff of a right, privilege or immunity secured by the Constitution or federal statutes. *See Blessing v. Freestone*, 520 U.S. 329, 340 (1997). It is a "generally and presumptively available federal remedy" for claimed violations of federal rights by state officials. *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). To prevail on a claim under section 1983, the asserted federal right must meet certain criteria: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the right created by the statute must not be so vague and amorphous that its

[3] The MPSC does cite one district court decision drawing this distinction – *Utility Reform Network v. California Public Utilities Commission*, 26 F. Supp. 2d 1208, 1213 (N.D. Cal. 1998), cited in MPSC Br. at 19-20. But the authorities cited by that court – principally the *Western Air Lines* decision of the Second Circuit – do not support the distinction.

enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the states. *Blessing*, 520 U.S. at 340-41. If these elements are satisfied, then section 1983 applies except in a rare case where a section 1983 action would be inconsistent with Congress's carefully crafted remedial scheme. *Id.* at 346-47.

Under the *Blessing* test, the provisions of the Act and the FCC regulations that give carriers the right to demand certain terms and conditions in interconnection agreements certainly create federal "rights" that are presumptively enforceable under section 1983.[4] Moreover, no feature of the Act, such as a comprehensive remedial scheme, suggests a congressional intent to bar claims under section 1983. *See GTE North, Inc. v. Strand*, 209 F.3d 909, 916 (6th Cir. 2000) (action challenging state commission order as inconsistent with 1996 Act properly brought under section 1983), *cert. denied*, 531 U.S. 957 (2000). Because Verizon alleged that the MPSC's enforcement decision deprived it of rights guaranteed under the Act and FCC regulations, it could validly invoke section 1983.

3. State law cause of action under Maryland administrative review procedures

Finally, even if *federal* law did not create a private right of action, Verizon has a state law cause of action under Maryland's administrative review act, Md. Code Ann., Pub.

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[4] The *Blessing* test should not be construed as requiring a showing of congressional intent comparable to that required in "implied right of action" cases. To do so would render section 1983 superfluous in statutory cases and effectively deny Congress the right to rely on section 1983 in passing new legislation affecting state obligations, without having to signify its intent regarding rights of action in each new piece of legislation.

Utils. Cos. § 3-203 *et seq.*[5] The MPSC does not deny that Verizon's federal claims can be heard in the context of that state law review procedure. It simply contends that Verizon's claims must be heard in state rather than federal court. MPSC Br. at 24; *see* ICC Br. at 7.

That is incorrect. Because the gravamen of Verizon's claims is that the agency violated specific federal rights, it is entitled to invoke its state-created right to administrative review in federal court. This Court has recognized that, even where a plaintiff's right of action is created by state law, the claims arise under the laws of the United States for purposes of section 1331 if the plaintiff's "well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law." *International College of Surgeons*, 522 U.S. at 164 (quoting *Franchise Tax Bd.*, 463 U.S. at 13).

In *International College of Surgeons*, the plaintiff filed an administrative appeal in state court under the Illinois Administrative Review Law to challenge a decision of the Chicago Historical and Architectural Landmarks Commission. *Id.* In addition to various state law claims, the plaintiffs also asserted that the commission's decision violated various rights secured by federal law. When the defendant sought to remove the case to federal court, the question arose whether the action originally could have been brought in federal court under section 1331. The Court

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[5] Verizon also has a more circumscribed cause of action against other private carriers under state contract law. As this Court held in *Jackson Transit*, where Congress has required private parties to enter into contracts pursuant to a federal statutory scheme, Congress presumably intended those contracts to be enforceable through a private right of action (though not necessarily involving federal questions, *see infra* pp. 16-17). *See* 457 U.S. at 20-21. Otherwise, Congress's directive that the parties enter into the contract in the first instance would be meaningless.

concluded that the plaintiff's claims alleging that the commission's decision violated the plaintiff's rights under federal law "unquestionably" satisfied the test for jurisdiction under section 1331. *Id.* That same conclusion applies here.[6]

4. *Rooker-Feldman* Does Not Apply Here.

Contrary to the MPSC's contention, the *Rooker-Feldman* doctrine has no application here. *Rooker-Feldman* is derived from 28 U.S.C. § 1257, which gives this Court jurisdiction to hear certain appeals from the highest court of a state. Reading that jurisdictional grant as exclusive, this Court has held that lower federal courts lack jurisdiction over challenges to the decisions of a state's highest court and issues "inextricably intertwined" with the judgment of a state's highest court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

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[6] The ICC makes the additional argument that Verizon's claims are not civil actions within the federal courts' original jurisdiction because, under the Maryland administrative review scheme, the court would be limited to on-the-record review of the MPSC's decision and would be required to afford deference to the MPSC's determinations. ICC Br. at 19-29. This Court rejected that argument in *International College of Surgeons*, 522 U.S. at 167-68 (claims limited to the administrative record "arise under federal law for purposes of federal question jurisdiction"); *id.* at 171 ("district courts frequently conduct deferential review pursuant to their original jurisdiction over federal questions"). *See also Califano v. Sanders*, 430 U.S. 99, 106-07 & n.7 (1977) (Congress intended section 1331 to grant jurisdiction over review of agency action). Contrary to the ICC's argument, the outcome in *International College of Surgeons* did not turn on the fact that one of the federal claims at issue had not been raised administratively and thus did not warrant deferential review. *International College of Surgeons*, 522 U.S. at 169-71.

This Court has never applied *Rooker-Feldman* to bar review of the determination of a state administrative agency in federal district court. The Court's analysis in *Feldman* is not to the contrary. *See* MPSC Br. at 44-45. There, the Court considered whether a state *court* decision denying an application for waiver of certain requirements to sit for the state bar exam was sufficiently judicial in character to bring it within this Court's exclusive jurisdiction. 460 U.S. at 476-77. Nothing in that analysis suggests that the doctrine should be extended to protect state administrative agencies from federal judicial review. Indeed, this Court has recognized that federal district courts have *original* jurisdiction to review decisions of state administrative agencies. *See International College of Surgeons*, 522 U.S. at 170-71.[7]

II. Verizon's Argument for Creation of Federal Common Law Is Not Encompassed by the Question Presented, Has Been Rejected by the Courts of Appeals, and Is Contrary to the Terms of the Act.

Verizon, like Ameritech in *Mathias*, pushes far beyond the question presented to argue that federal common law governs the interpretation of negotiated provisions in interconnection agreements. Although the incumbent carriers in both cases devote considerable ingenuity to interweaving this argument with others, in reality there is no need for the Court to address the argument in order to answer the questions presented in either case. Indeed, this Court has declined to grant Ameritech's petition challenging the

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[7] Applying *Rooker-Feldman* here would also effectively impose a requirement that Verizon exhaust its state judicial remedies before asserting its federal claim to this Court. This Court has held that exhaustion of state remedies is not required under section 1983. *See Edwards v. Balisok*, 520 U.S. 641, 649 (1997). Moreover, requiring exhaustion of state *judicial* remedies would effectively repeal section 1983 as applied to administrative agency cases.

Seventh Circuit's holding that interpretation of interconnection agreements is governed by state contract law. *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, No. 00-921. But if the Court nevertheless reaches the issue, it should hold that claims of misinterpretation of interconnection agreements arise under state law.

A. The Issue of the Scope of Federal Claims in Enforcement Cases Is Not Before the Court.

In this case and *Mathias*, the Court reformulated the questions presented to limit argument to what is in essence a single overarching issue: whether federal district courts have the power to adjudicate a claim that a state commission determination interpreting and enforcing an interconnection agreement violates federal law. As demonstrated by WorldCom's briefs in both cases, the answer is yes: statutory jurisdiction over such claims exists under both 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6), and the adjudication of such claims is consistent with the Eleventh Amendment.

Moreover, the existence in this case (and *Mathias)* of *bona fide* federal questions can hardly be doubted. Verizon alleged that the state commission's determination requiring reciprocal compensation for calls to ISPs violates a specific FCC order. That asserted violation of a federal regulation plainly arises under federal law.

But that does not mean that federal law governs every claim asserted by Verizon. For example, Verizon alleged that the state commission's determination requiring reciprocal compensation for calls to ISPs violates a negotiated provision of the interconnection agreement between Verizon and WorldCom. Every court of appeals

that has considered *that* issue has held that a commission's alleged misinterpretation of a negotiated interconnection agreement does not constitute a violation of federal law. *See* Br. in Opp. of Resps. WorldCom, *et al.*, at 9-13, *Mathias v. WorldCom Techs., Inc.*, Nos. 00-878, 00-921 (U.S. filed Jan. 16, 2001) (reviewing cases in detail). There is, therefore, no reason for the Court to reach out at this point and address that broader issue.

To the contrary, the Court will fully address the lower courts' need for guidance if it simply answers the questions actually presented and decides whether federal courts may entertain federal-law challenges to state commission enforcement decisions that are not facially insubstantial. There is no reason to go further by deciding on which side of the federal-state divide any specific claim falls. Staking out that dividing line is better left to case-by-case adjudication and percolation in the lower courts. In the unlikely event that a circuit split develops over any agreement-specific issues requiring intervention by this Court, the Court's decision will be aided materially by the lower courts' experience in addressing the myriad possible fact patterns that might arise in this context.

B. Claims of Misinterpretation of Interconnection Agreements Arise Under State Law.

If the Court reaches the issue, it should reject the sweeping argument made by Verizon and Ameritech that federal law governs *every* dispute concerning the interpretation and enforcement of interconnection agreements. *See* Verizon Br. at 20 ("Any Claim Based on a 1996 Act Interconnection Agreement Arises Under Federal Law"). That position not only is extreme, it is flatly

contradicted by Congress's express preservation of the states' authority to impose *state law* requirements when reviewing interconnection agreements. 47 U.S.C. § 252(e)(3); *see also id.* § 251(d)(3) (preserving state interconnection regulations not inconsistent with 1996 Act); *id.* § 261(c) (permitting state commissions to impose additional requirements necessary to further competition consistent with the Act and FCC regulations); *id.* § 152 note (Pub. L. No. 104-104, § 601(c)) (Act not to be construed to supersede state or local law unless expressly so provided). Congress would hardly have preserved state law if it viewed interconnection agreements as governed by federal law alone.

The incumbents' position is also contrary to Congress's decision to allow parties to interconnection agreements to negotiate terms "without regard to" the substantive requirements otherwise imposed by the Act and the FCC's implementing regulations. 47 U.S.C. § 252(a)(1). Since such negotiated provisions are not subject to the specific requirements of the relevant federal statute and regulations, the duties created are essentially contractual in nature. Thus, if federal law were to control the enforcement and interpretation of negotiated agreements, it would have to be a federal common law of contracts. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) (issue not addressed by federal statute would be governed by federal law only through creation of federal common law).

This Court has made increasingly clear that courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). A court should contemplate creating federal common law only in "few and restricted" cases "where there is a significant conflict between some federal

policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87 (internal quotation marks and citations omitted). When dealing with a comprehensive statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85. Here, especially given Congress's express preservation of state law applicable to interconnection agreements, *see, e.g.*, 47 U.S.C. § 252(e)(3), the incumbents cannot possibly show that applying state law to the interpretation of negotiated interconnection agreements poses "a significant conflict" with federal policies or interests.

The only statutory support identified by the incumbents for their position is the Act's reference to negotiated agreements as "binding." *Id.* § 252(a)(1). That single word in no way signifies a congressional intent to federalize all obligations created in negotiated interconnection agreements. Clearly, Congress intended that those agreements would constitute "binding" contracts. But if it had wanted the courts to create a federal common law governing those binding contracts, it would have said more than that. After all, applying state contract law to interpret and enforce negotiated interconnection agreements fully effectuates their binding character. Congress could hardly have supposed that by using the word "binding" it was establishing some sort of federal policy barring courts from following the usual approach of applying state law to fill in the gaps left in federal legislation.

Nor does Verizon succeed in showing that the creation of federal common law is warranted here under *Jackson Transit* or *Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963). In *Jackson Transit*, the Court held that, although federal law required certain parties to enter into collective bargaining agreements and Congress

intended those agreements to be enforceable, *see Jackson Transit*, 457 U.S. at 20-21, the resulting agreements were governed by state law, *id.* at 23-29. *Jackson Transit* thus establishes that federal common law need not govern the interpretation and enforcement of contracts whose existence and binding character is required by federal law.

The Court's earlier decision in *Machinists* is not to the contrary. That case concerned a Railway Labor Act requirement that collective bargaining agreements in the air industry include provisions creating "boards of adjustment" to settle employee grievances. 372 U.S. at 690. Because the federal statute required an agreement to include provisions creating an adjustment board, the interpretation and enforcement of the agreement to comply with that specific statutory requirement was a question of federal law. *Id.* at 690-91. In finding that federal law governed, the Court also observed that labor relations affecting interstate transportation have long been a specifically federal concern under the Railway Labor Act, *see id.* at 686-87, and that the interstate character of the agreements required application of federal law to ensure uniformity, *see id.* at 692 n.15.

Negotiated provisions in interconnection agreements have none of the characteristics that underlay the holding in *Machinists*. Most importantly, *Machinists* held that federal law governed the interpretation of contractual provisions creating boards of adjustment precisely because Congress specifically *required* inclusion of contractual provisions creating such boards. In contrast, section 252(a)(1) of the 1996 Act expressly *exempts* negotiated provisions in interconnection agreements from the Act's substantive requirements. Nor do interconnection agreements implicate labor relations, a field that has been unusually fertile ground for federal common law due to the specific historic context

in which Congress enacted statutes such as the Railway Labor Act to ensure labor peace, *see Machinists*, 372 U.S. at 686-91.

In an attempt to escape the fact that the 1996 Act – unlike the Railway Labor Act – does not impose specific requirements that must be incorporated into negotiated interconnection agreements, the incumbents repeatedly invoke the Fourth Circuit's observation in another context that negotiated interconnection agreements may at times track the substantive requirements of the statute. *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). Whether or not that is true, the parties are free to bargain for quite different terms, trading their rights under the Act for specific provisions of greater value to them. While the substantive requirements of the Act may form a backdrop for such negotiations, Congress could not have been clearer that carriers may enter into negotiated agreements "without regard to" those substantive requirements. 47 U.S.C. § 252(a); *see also id.* § 252(e)(2)(A) (prohibiting state commissions from rejecting negotiated agreements that do not comply with Act's substantive requirements). It follows that the negotiated terms of interconnection agreements are not dictated by federal law as they were in *Machinists*. Certainly the Fourth Circuit implied no such thing in *AT&T Communications*, 229 F.3d at 465, and it emphatically rejected the incumbents' position in the present case, *see* Pet. App. 25a-28a.[8]

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[8] The notion that interconnection agreements end up merely mirroring federal law is further belied by the fact that the law in this area is dynamic. Here, for example, Verizon makes much of the fact that the interconnection agreement at issue was similar to the then-existing federal regulations in its limitation of reciprocal compensation to "local traffic." Verizon Br. at 8. But that is no longer the relevant standard under current FCC rules. *See supra* p. 6 n.2.

Finally, there is no merit to the incumbents' attempt to liken interconnection agreements to federal tariffs. Formerly, carriers were required to file tariffs for *interstate* services with the FCC, and such tariffs were governed by federal law to prevent rate discrimination and ensure uniform nationwide treatment. *See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998).[9] But an interconnection agreement is not an interstate tariff requiring uniform treatment nationwide. Rather, an interconnection agreement applies primarily to services *within a single state*. Indeed, Congress specifically provided that states may impose their own requirements in arbitrated agreements. *See, e.g.*, 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b)-(c), 152 note (Pub. L. No. 104-104, § 601(c)). Thus, the need for nationwide uniformity in the case of federal interstate tariffs is absent here.[10]

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[9] Pursuant to the market-oriented policies of the Act, the FCC has now issued "detariffing" rules that no longer permit carriers to file federal interstate tariffs for long-distance services, *see In re Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 15 F.C.C.R. 22321 (2000), on the ground that tariffing is no longer "necessary to ensure just and reasonable, nondiscriminatory rates, nor necessary for the protection of consumers," *MCI WORLDCOM, Inc. v. FCC*, 209 F.3d 760, 763 (D.C. Cir. 2000). It would be ironic indeed if the 1996 Act extended federal tariff status to intrastate services just as it spelled the demise of the federal tariff doctrine for interstate services.

[10] To the extent interconnection agreements resemble tariffs at all, they are akin to state rather than federal tariffs. Indeed, the "opt-in rights" on which the incumbents place so much emphasis, *see* 47 U.S.C. § 252(i), are only available within a specific state, not nationwide. *E.g., In re Application of GTE Corp.*, 15 F.C.C.R. 14032, ¶ 314 (2000). Similarly, interconnection agreements are filed with state commissions, 47 U.S.C. § 252(h), not the FCC. The incumbents cite no authority for the proposition that federal law governs state tariffs.

In short, there is no basis whatsoever for the incumbents' contention that federal law governs *every* aspect of the interpretation and enforcement of interconnection agreements. The Act makes plain that Congress intended interconnection agreements to be subject to a mixed regime of federal and state law. To be sure, where Congress determined that federal policies require the promulgation of uniform federal standards for interconnection agreements – either through the specific requirements of the Act itself or through the regulations the FCC is authorized to issue – federal law governs. But that does not transform every dispute involving interconnection agreements into a question of federal law. There is thus no basis for disturbing the unanimous determinations of the courts of appeals that some claims pertaining to interconnection agreements are governed by state law. The precise demarcation between state and federal law in this area is best left to case-by-case adjudication in the lower courts confronting the multiplicity of fact patterns in which this question could arise.[11]

CONCLUSION

For the reasons set forth above and in our opening brief, the Court should reverse the Fourth Circuit's decision that the district court lacked general federal question jurisdiction under 28 U.S.C. § 1331.

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[11] As to the MPSC's Eleventh Amendment arguments, WorldCom respectfully refers the Court to its brief in the *Mathias* case. Br. of Resps. WorldCom Techs., Inc., *et al.*, *Mathias v. WorldCom Techs, Inc., et al.*, 00-878, at 33-50 (U.S. filed Sept. 10, 2001). In addition, we note that the Third Circuit recently joined the majority of circuits that have rejected the Eleventh Amendment arguments raised here. *See MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, __ F.3d __, 2001 WL 1381590, No. 00-2257 (3d Cir. Nov. 2, 2001).

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v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
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PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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47 U.S.C. § 252(a)(1) 5, 12, 13, 14

47 U.S.C. § 252(d)(1) 5

47 U.S.C. § 252(e) 16

47 U.S.C. § 252(e)(2)(B) 3

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47 U.S.C. § 252(e)(5) 9

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IN THE

Supreme Court of the United States

No. 00-1531

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

No. 00-1711

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER VERIZON MARYLAND INC.

Respondent Maryland Public Service Commission ("PSC") defends the Fourth Circuit's § 1331 holding on two grounds. First, it maintains that Verizon has no private right of action under federal law to challenge the PSC's determination. Second, it argues that the Fourth Circuit correctly held that the *Rooker-Feldman* doctrine forecloses federal court review of state administrative adjudications. These arguments reflect a profound misunderstanding of both the Telecommunications Act of 1996 ("1996 Act") and the

principles governing the jurisdiction of the federal courts.[1]

ARGUMENT

I. A STATE COMMISSION DECISION INTERPRETING AN INTERCONNECTION AGREEMENT IS AN EXERCISE OF FEDERAL STATUTORY AUTHORITY THAT IS SUBJECT TO FEDERAL JUDICIAL REVIEW

At the core of its arguments is the PSC's fundamental unwillingness to accept this Court's determination that, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" "has taken the regulation of local telecommunications competition away from the States." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). Though Congress offered states an opportunity to "participat[e] in the administration of the new *federal* regime" (*id.*), it did so with the understanding that, when a state accepts the offer and voluntarily exercises federal regulatory authority, its determinations will be subject to review in a federal district court. As this Court pointedly observed, one thing about which "there is no doubt" is "that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.*

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[1] The PSC devotes a substantial portion of its brief to arguing that the PSC and its members are immune from suit in federal court under the Eleventh Amendment. PSC Br. 26-42. Although the petitions for writs of certiorari in these cases presented two Eleventh Amendment questions (waiver and *Ex parte Young*), the Court limited its grant of certiorari to the § 1331 question. Verizon accordingly did not argue the Eleventh Amendment issues in its opening brief, *see* Verizon Br. 30 n.11, and will refrain from responding to the PSC's Eleventh Amendment arguments in this reply brief. The Eleventh Amendment issues are before the Court in *Mathias v. WorldCom Technologies, Inc.*, No. 00-878, and the briefs of the respondents and of *amici curiae* BellSouth Corporation, *et al.*, in that case discuss and thoroughly refute the same arguments that the PSC makes in this case.

The PSC has taken full advantage of the opportunity to administer the federal regime, not only arbitrating and approving initial agreements, but also resolving interpretive disputes. It claims here, however, that its administrative determinations — at least those involving the interpretation or enforcement of interconnection agreements — are subject only to state court review.

But even if the Court decides, in No. 00-878, that § 252(e)(6) does not authorize federal judicial review of decisions interpreting and enforcing interconnection agreements, it by no means follows that the federal courts are without subject matter jurisdiction. Because 1996 Act interconnection agreements are instruments of federal regulation, and because the PSC's interpretation of such an agreement is an exercise of federal regulatory authority, actions seeking judicial review of such interpretive decisions arise under federal law and therefore properly invoke the district court's general federal-question jurisdiction under § 1331.

When a state commission interprets and applies the requirements of the 1996 Act in the course of arbitrating and approving an agreement — that is, when it decides whether an agreement "meet[s] the requirements" of §§ 251 and 252 (47 U.S.C. § 252(e)(2)(B)) — the statute both expressly permits federal court review (*id.* § 252(e)(6)) and expressly *prohibits* state court review (*id.* § 252(e)(4)). But identical legal issues may arise when a state commission interprets and enforces an agreement that has already been approved. That is most apparent where a dispute arises over the meaning of a requirement that the state commission imposed during arbitration. In that circumstance, the requirements of the 1996 Act and the obligations set forth in the parties' interconnection agreement are not "different sides of the same coin — they are the same side of

the same coin." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 683 (1999).

When a state commission interprets an interconnection agreement in such circumstances, it performs the precise function that Congress determined should be subject to exclusive federal review: elaboration of the substantive statutory obligations imposed by the 1996 Act. It is difficult to imagine why Congress, having provided for *exclusive* federal court review of initial approval determinations, would have *prohibited* federal court review when the same function is performed after approval. If that were its intention, one would expect to see a provision mirroring the preclusive language of § 252(e)(4). *See* Verizon Br. 32-34; U.S. Br. 21-22.

That is no less true in the case of agreements reached through negotiation rather than arbitration. When a state commission interprets a negotiated agreement, it likewise performs a function that is equivalent to the arbitration and approval function under § 252. As an initial matter, parties often adopt provisions through mutual agreement that precisely track the requirements of federal law (as, indeed, the parties did here). *See AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) ("many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act"). In that circumstance, again, interpretation of an agreement *is* an elaboration of the 1996 Act's requirements.

But even when a state commission interprets a negotiated agreement containing terms that do not track the precise requirements of §§ 251 and 252, its decision still amounts to an elaboration of obligations imposed by the 1996 Act. That is so because an interconnection agreement reached through negotiation is

not a voluntary, private commercial contract, and its enforcement is not a matter of ordinary contract law. Section 251(c)(1) requires incumbent LECs to enter into interconnection agreements upon a competing carrier's request. Such agreements "fulfill" the duties prescribed in § 251(b) and (c). 47 U.S.C. § 251(c)(1). Those provisions impose on incumbent LECs extraordinary obligations to provide affirmative assistance to their competitors, forcing incumbent LECs, for example, to surrender their network equipment at prices set by regulators at cost (*id.* §§ 251(c)(3), 252(d)(1)); to accommodate the equipment of competitors on their private property (*id.* § 251(c)(6)); and to make services available for resale at a discount determined by regulators (*id.* § 251(c)(4)). Incumbent LECs must do all of this whether or not it promotes their business interests — indeed, despite the fact that such assistance to competitors may well ultimately undermine their business interests.

To be sure, the specific terms of interconnection agreements may be worked out by the parties in negotiation. *Id.* § 252(a)(1). But that is a detail: the duty to enter into such arrangements in the first place, and the baseline requirements on which competitors may insist, are indisputably imposed by the 1996 Act. Interconnection agreements are therefore instruments of coercive federal power; they do not reflect the parties' mutual assent to enter into a binding exchange of promises. *Cf.* Restatement (Second) of Contracts §§ 17, 71 (1981). Accordingly, when a state commission interprets a term reached through negotiation, and dictates the obligations to which the parties are subject, the state commission has elaborated requirements imposed by federal law no less than in those cases where the determination is directly governed by the provisions of the 1996 Act itself. The state commission, in

either case, "participat[es] in the administration of the new *federal* regime." *AT&T*, 525 U.S. at 378 n.6.

Such determinations differ sharply from private-law adjudication in other ways as well. As an initial matter, the 1996 Act *requires* incumbent LECs to provide service in accordance with the terms of interconnection agreements. *See, e.g.*, 47 U.S.C. § 251(c)(3). Unlike parties to a private commercial contract, the parties to an approved interconnection agreement may not simply agree not to abide by the terms of their agreement.

If there were any doubt that interpretation and enforcement decisions have federal regulatory consequences, § 252(i) resolves it. That provision requires incumbent LECs to make "any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). *See AT&T*, 525 U.S. at 395-96. By operation of § 252(i), any obligation undertaken through negotiation becomes a public-law duty that extends to all telecommunications carriers, equivalent to the obligations imposed under § 251(b) and (c). Accordingly, when a state commission interprets and enforces an interconnection agreement, including the negotiated terms in such an agreement, its decision is not merely an exercise in private contract interpretation; it also determines the scope of the incumbent LEC's federal statutory obligations under § 252(i).[2]

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[2] *Amicus* State of Illinois completely ignores the significance of § 252(i) in its fanciful account of "real world cost-benefit analysis employed in contracting." Illinois Br. 14. Because of § 252(i), an incumbent LEC cannot make concessions to one competitor without providing the same concessions to every other competitor that requests them. *See* Verizon Br. 4 ("an incumbent cannot safely engage in ordinary 'give-and-take'") (citing *AT&T*, 525 U.S. at 395). Likewise, a competing

Congress adopted § 252(i) because it recognized that the federal statutory obligations take concrete form through interconnection agreements, arbitrated *and* negotiated. For precisely that reason, all state commission decisions determining the scope of obligations imposed through interconnection agreements — whether reached before or after approval — must be subject to the same federal court review.

II. FEDERAL COURTS HAVE JURISDICTION UNDER § 1331 TO REVIEW DECISIONS MADE BY STATE OFFICIALS EXERCISING FEDERAL STATUTORY AUTHORITY

A. The PSC's lead argument is that Verizon lacks a private right of action under the 1996 Act. PSC Br. 11-25. But that argument conflates the district court's subject matter jurisdiction with the merits of Verizon's claims. As this Court recently reiterated, "[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). "Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)). Here, Verizon seeks to enjoin enforcement of a PSC order on the ground that it violates federal law. There can be no serious doubt — whatever the cause of action — that Verizon's right to relief therefore depends on the proper construction of governing federal law.

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carrier need not make any concessions in negotiating an agreement, because it can always simply avail itself of its opt-in right under § 252(i) to pick and choose the best available terms implementing the requirements of § 251(c).

In any event, the PSC misconceives the nature of Verizon's claims. As the PSC itself recognizes, Verizon's suit was an action for "federal court review of an order" of the PSC. PSC Br. 2. Verizon seeks review to ensure that a *regulator* has acted in conformity with the requirements of the very federal statute that the regulator is administering. In that circumstance, a *federal* right to judicial review is presumed, and such review is a basic component of federal courts' jurisdiction under § 1331. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991). No "private right of action" is required to secure such review, and the inquiry described in *Cort v. Ash*, 422 U.S. 66 (1975), is inapposite.

The First Circuit, in an opinion by then-Judge Breyer, explained this pivotal distinction in *NAACP v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987). The plaintiff there argued that it had a "private right of action" to enforce obligations that a federal statute (Title VIII of the Civil Rights Act of 1968) imposed on the federal agency administering the statute. *Id.* at 152. After noting that no private right of action was available under Title VIII, the court observed that the "private right of action" inquiry did not fit the situation where a private party seeks review of federal agency action, because such "federal action is nearly always reviewable for conformity with statutory obligations." *Id. See also Cousins v. Secretary of United States Dep't of Transp.*, 880 F.2d 603, 606 (1st Cir. 1989) (en banc) (Breyer, J.).

A private right of action is needed in the quite different situation where a private individual seeks a remedy for an injury inflicted by actions that allegedly violate federal law but are not an exercise of federal administrative authority. *See NAACP*, 817 F.2d at 152. To be sure, such actions may be taken by a state

or other non-federal government actor. For example, in *California v. Sierra Club*, 451 U.S. 287 (1981), the Court considered whether a private individual could sue to enforce the Rivers and Harbors Appropriation Act of 1899, which prohibits the "creation of any obstruction" in the navigable waters of the United States. 33 U.S.C. § 403. Relying on the 1899 Act, the plaintiff sought to enjoin the defendants — including the State of California — from operating or constructing water diversion facilities. In that situation — where state action allegedly ran afoul of a distinct federal statute (but was not an exercise of federal regulatory power) — a private plaintiff may proceed only if the statute provides a private right of action "to enforce the federal statute directly against the non-federal person." *NAACP*, 817 F.2d at 152.

What distinguishes this case from *Sierra Club* is that the agency here, though created by state law, was in fact exercising federal regulatory authority, having elected to "participat[e] in the administration of the new *federal* regime." *AT&T*, 525 U.S. at 378 n.6. As the Seventh Circuit aptly put it, a state commission acts as a "deputized" federal regulator and "regulat[es] on behalf of Congress" when it enforces a 1996 Act interconnection agreement. *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343, 344 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001). The PSC was therefore a federal, not a non-federal, actor, in the jurisdictionally relevant sense. Had the PSC not exercised the authority conferred by Congress — had it declined to "carry out its responsibility" under § 252 — the Federal Communications Commission ("FCC") would have interpreted and enforced the interconnection agreement in its stead. *See* 47 U.S.C. § 252(e)(5).[3]

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[3] That is precisely what happened when the Virginia State Corporation Commission declined to exercise its authority under § 252 to "interpret and enforce" an interconnection agreement. *See* Memorandum

In that event, even if judicial review were not expressly authorized by the Hobbs Act, there can be no doubt that judicial review would be available in federal court under § 1331. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

The result should be no different here, because the regulatory regime is no less "federal" in nature even when it is "administered by 50 independent state agencies." *AT&T*, 525 U.S. at 378 n.6; *see also* PSC Br. 18 ("primary responsibility for overseeing the implementation of §§ 251 and 252 remains with State administrative agencies"). Verizon is no less subject to an exertion of federal administrative authority when that authority is wielded by the PSC rather than the FCC. Because Verizon's claim is that the PSC's decision constitutes "the exertion of unauthorized administrative power" under a *federal* statute, its claims fall within the jurisdiction of federal courts. *Stark v. Wickard*, 321 U.S. 288, 310 (1944).

For this reason, the burden is on the PSC to identify "'clear and convincing evidence'" of Congress's intent to "restrict access" to federal judicial review. *Abbott Labs.*, 387 U.S. at 141; Verizon Br. 30-35. The PSC ignores this standard, and instead argues that, because Congress affirmatively authorized review under § 252(e)(6), its failure to do so in cases involving a state commission's interpretation or enforcement of an interconnection agreement (assumed for the purposes of this case) implies an intention to foreclose federal

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Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000).

court review. PSC Br. 16. But that argument is inconsistent with this Court's prior holding that "[t]he mere fact that some acts are made reviewable *should not suffice to support an implication of exclusion as to others*." *Abbott Labs.*, 387 U.S. at 141 (emphasis added; internal quotation marks omitted); *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986). In the absence of *affirmative* evidence of intent to foreclose review — and the PSC does not and cannot offer any — this Court should conclude that Congress intended all state commission actions taken in the exercise of federal authority under the 1996 Act to be subject to federal judicial review. That conclusion flows naturally from the Court's recognition in *AT&T* that "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." 525 U.S. at 378 n.6.[4]

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[4] Even if, as the PSC suggests, Verizon's cause of action were created by Maryland's statutory judicial review provision (*see* Md. Code Ann., Pub. Util. Cos. § 3-202 (1998)), the district court would still have jurisdiction over such a claim because Verizon's "'right to relief under state law requires resolution of a substantial question of federal law.'" *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997) (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)).

Amicus Illinois — but not the PSC — argues that, insofar as Verizon's cause of action rests on Maryland's statutory judicial review provision, this suit does not qualify as a "civil action" within the meaning of § 1331. Illinois Br. 24-29. But Illinois's principal authority for that proposition is the very Seventh Circuit decision that this Court reversed in *City of Chicago*. As this Court stated in rejecting the same argument there, an action for judicial review of an agency adjudication — for example, an administrative condemnation proceeding — "is 'in its nature a civil action and subject to removal by the defendant to the United States District Court.'" *City of Chicago*, 522 U.S. at 170 (quoting *Chicago, R.I. & P.R.R. v. Stude*, 346 U.S. 574, 578-79 (1954)). "[D]istrict courts routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *Id.* at 171. Under Maryland law, moreover, actions for review of administrative decisions are defined as civil actions.

B. Regardless of the source of Verizon's cause of action, its claims arise under federal law and are within the district court's § 1331 jurisdiction. As we explained in our opening brief, that is true for at least three reasons; the PSC's counter-arguments are unavailing.

First, § 252(a)(1) specifically provides that interconnection agreements are "binding." Verizon's claim that the PSC has imposed obligations inconsistent with the terms of its "binding" agreements therefore alleges a direct violation of Verizon's federal statutory right. Verizon Br. 17-20.[5] Such a claim, "which turn[s] exclusively on federal law, unquestionably fits" within the district court's original jurisdiction. *City of Chicago*, 522 U.S. at 164. The PSC simply ignores this argument. *Amicus* Illinois claims that the position is "odd" because Verizon "has maintained that the disputed reciprocal compensation provisions at issue in this case" track the requirements of federal law. Illinois Br. 11 n.1. That response is a non-sequitur. Verizon's position here is that the parties, pursuant to § 252(a)(1), negotiated an agreement that tracks the

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See Md. Code Ann., Pub. Util. Cos. § 3-206(b)(2) (1998) (providing that proceedings for judicial review shall be given precedence "over all *other* civil actions") (emphasis added). It is of course irrelevant that Maryland law designates state court as the proper venue for such an action; Maryland cannot deprive federal courts of jurisdiction granted by Congress under § 1331. *See Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286 (1872); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982).

[5] Section 252(a)(1) may not plausibly be dismissed as intended simply to permit agreements that stray from the 1996 Act's duties. *See* PSC Br. 22; Illinois Br. 11-13. Congress could have accomplished *that* objective without including the term "binding." Its inclusion must therefore be understood to have independent significance. *See, e.g., TRW Inc. v. Andrews*, No. 00-1045, slip op. at 10-11 (U.S. Nov. 13, 2001) (applying "cardinal principle" that a statute should be construed, if possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted).

requirements of federal law. The PSC imposed obligations on Verizon that are inconsistent both with federal law *and* (for that reason) with the parties' agreement. It is the *latter* inconsistency that is relevant for purposes of Verizon's claim of violation of its federal right to a "binding" agreement under § 252(a)(1).

Second, the underlying obligations at issue in this case — which form the substantive basis of Verizon's claim — are federal in nature because the interconnection agreement is a federal contract. Verizon Br. 20-25. The PSC, joined by WorldCom, disputes this point, arguing that interconnection agreements are simply state-law contracts the interpretation and enforcement of which raise only issues of state law to be resolved by state courts. PSC Br. 20-21; WorldCom Br. 19-20. Both rely on *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), in which this Court held that employment contracts between local governments and their employees, though required by federal law as a condition of receiving certain federal financial assistance, were controlled by state law, and that a suit to enforce such a contract therefore presented only state-law claims. What both the PSC and WorldCom overlook is that the Court rested its decision on a determination, informed by the particular statute's text and legislative history, that Congress "intended those contracts to be governed by state law applied in state courts." *Id.* at 29. *See* Verizon Br. 24-25. Had Congress not made its intentions so clearly known, the contracts would have been deemed "creatures of federal law," and the suit at issue would have stated federal claims. *Jackson Transit*, 457 U.S. at 23.

Congress exhibited no such intention in the 1996 Act, and this case is therefore controlled by *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). *See* Verizon Br. 21-24. Because

interconnection agreements are Congress's chosen instrument for implementing the substantive duties contained in §§ 251 and 252, "their validity, interpretation, and enforceability" are matters of federal law. 372 U.S. at 691. WorldCom simply ignores *Central Airlines*, and the PSC, while purporting to distinguish the case, offers no principled basis for doing so. *See* PSC Br. 24.

Third, it is beyond dispute that, if interconnection agreements are properly considered tantamount to federal tariffs, their construction raises a federal question. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983); Verizon Br. 25-29. The PSC admits, as it must, that interconnection agreements "are analogous to tariffs," but it argues that they should be considered *state* tariffs, not federal tariffs. PSC Br. 22-23. That argument is untenable, most obviously because the underlying obligations that the interconnection agreements "fulfill" (*see* 47 U.S.C. § 251(c)(1)) — the requirements of §§ 251 and 252 — are imposed by federal, not state, law. Moreover, the characteristics that give interconnection agreements their tariff-like character — that they must include "a detailed schedule of itemized charges" (*id.* § 252(a)(1)), that they must be filed and made available for public inspection (*id.* § 252(h)), that the incumbent LEC must provide service in accordance with their terms (*id.* § 251(c)(2)(D), (c)(3)), and, perhaps most important, that their provisions must be made available to all other carriers on the same terms and conditions (*id.* § 252(i)) — all reflect requirements of federal law, not state law. The PSC does not and cannot explain why the mere fact that federal law requires such agreements to be filed with state commissions, rather than with the FCC, alters their fundamentally federal character.

C. WorldCom's claim that the district court had jurisdiction under § 1331 but that it does not have jurisdiction to decide the substance of the issues presented is incorrect and internally inconsistent. As Verizon has always made clear, its claim for relief in this case rests on the allegation that the PSC grossly misinterpreted the parties' governing interconnection agreement and thereby materially altered its terms. The district court's jurisdiction must stand or fall on whether such a claim raises a substantial federal question. WorldCom's strategy of arguing *both* that "interpretation of th[e] contract" does not raise "a federal question" (WorldCom Br. 20) *and* that Verizon's case belonged in federal court in the first instance is legally indefensible.[6]

Contrary to WorldCom's argument, Verizon's claims here depend exclusively on rights and obligations created under federal law. The suggestion that interconnection agreements are mere state-law contracts ignores the reality that Verizon does not execute such interconnection agreements voluntarily but is required to submit to the coercive effect of such agreements in order to fulfill its statutory obligations under the 1996 Act. *See* Verizon Br. 20-21. The legal effect of such interconnection agreements is dictated by federal, not state, law — indeed, even if state law *barred* such

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[6] Such a strategy is evidently designed simply to create the greatest possible obstacle to effective judicial review of erroneous state commission decisions — like the ones at issue in this case and in No. 00-878 — concerning "reciprocal compensation" for Internet-bound traffic, decisions that have delivered WorldCom a billion-dollar "windfall." *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9183, ¶ 70 (2001), *petitions for review pending*, Nos. 01-1218 *et al.* (D.C. Cir.).

agreements between competitors, they would remain "binding" by operation of *federal* law. *Id.* at 20-29.[7]

Just as important, WorldCom's view leads to an "incoherent jurisdictional scheme." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996). Under WorldCom's view, a plaintiff would have to bring suit in federal court first to determine whether a state commission's interpretive decision violates federal law — a claim that must presumably rest on some basis other than an error in interpreting an agreement's terms. Only after the federal court has ruled (and appeal rights have been exhausted) may a plaintiff pursue a claim in state court based on the state commission's supposed violation of state-law rights under the interconnection agreement. As the Seventh Circuit put it, "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court . . . and then may move to state court." No. 00-878 Pet. App. 5a. It is inconceivable that Congress would have created so inefficient a scheme.

Indeed, the Court in *Bank One* rejected an interpretation of the Expedited Funds Availability Act that strikingly resembles WorldCom's proposed interpretation of the 1996 Act. The Seventh Circuit had read the statute to require a bifurcated jurisdictional scheme in which certain types of claims "would be adjudicated in

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[7] If WorldCom were right and interconnection agreements were state-law contracts, then the PSC had no jurisdiction over the parties' dispute in the first place. The PSC has jurisdiction only over claims that "allege a violation" of the state statute. Md. Code Ann., Pub. Util. Cos. § 3-102(a)(2)(1998). Nothing in Maryland law gives the PSC jurisdiction over common-law claims of breach of contract. Indeed, the implication of WorldCom's argument is that state commissions would generally have no role in interpreting or enforcing agreements once they have been approved under § 252(e). This is a position that not only WorldCom itself (and every other party to this case) but also every court to consider this issue has correctly rejected.

one forum" while other claims arising out of the same transaction "would originate in another." *Bank One*, 516 U.S. at 275. "And [other] claims under state law would presumably have to be raised in a separate state-court proceeding." *Id.* The Court refused to accept the Seventh Circuit's vision of fractured jurisdiction. "Even if the text of [the statute] could plausibly be read to create this decidedly inefficient jurisdictional scheme, we would hesitate to attribute such a design to Congress." *Id.* at 275-76.

The Court should show the same hesitancy here. Because interconnection agreements are inherently federal in nature, and because state commission decisions interpreting and enforcing those agreements are exercises of federal authority that Congress has entrusted to the state regulatory agencies, such decisions, in their entirety, are properly subject to unified federal court review.

III. THE *ROOKER-FELDMAN* DOCTRINE IS INAPPLICABLE TO DECISIONS OF ADMINISTRATIVE AGENCIES

The PSC's argument that this Court's *Rooker-Feldman* doctrine bars review here misconceives the substance of this Court's precedents. Perhaps most fundamentally, the principles of *Rooker-Feldman* do not apply here because the PSC acted pursuant to authority conferred by federal law, not state law. As the PSC notes, both the state and federal governments have the power "to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review." *Printz v. United States*, 521 U.S. 898, 929 n.14 (1997). Here, the PSC's authority to interpret and enforce interconnection agreements was granted by Congress, not by the State of Maryland. Verizon Br. 37-39. Accordingly, even if *Rooker-Feldman* were applicable to administrative

adjudications conducted under the authority of state law (and it is not), the doctrine would not apply here.

Even the dissenters in *City of Chicago* — who were otherwise skeptical about federal court review of state agency action — acknowledged the importance of this distinction. As Justice Ginsburg stated, the notion that federal courts may review state administrative action undertaken pursuant to a federal statute (in that case, the Individuals with Disabilities Education Act ("IDEA")) is unremarkable. "IDEA creates a *federal* regime. While IDEA may require federal courts to defer to state agency decisions, those decisions are made pursuant to *federal* legislation." *City of Chicago*, 522 U.S. at 180 n.4 (Ginsburg, J., dissenting). The same reasoning applies here and explains why federal court review is completely natural: the PSC's order too was issued in the exercise of authority conferred by federal legislation — the 1996 Act.

In any event, *City of Chicago* makes clear that the *Rooker-Feldman* doctrine does not apply to decisions of state agencies — even when those agencies act pursuant to a *state* administrative scheme. *See City of Chicago*, 522 U.S. at 169 ("federal jurisdiction generally encompasses judicial review of state administrative decisions"); Verizon Br. 35-37. The PSC argues that *City of Chicago* is distinguishable because there the district court's jurisdiction over claims involving on-the-record review of a state administrative order rested on 28 U.S.C. § 1367, the supplemental jurisdiction statute. PSC Br. 46-47. But that is no distinction at all for present purposes: the *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257(a) — which gives this Court jurisdiction to review judgments of a state's highest court — to foreclose such review by lower federal courts. The supplemental jurisdiction statute

provides no exception to that rule.[8] That the Court permitted on-the-record review of a state administrative adjudication in *City of Chicago* (despite a prominent reference to *Rooker* in the dissent, *see* 522 U.S. at 176-77 (Ginsburg, J., dissenting)) establishes that the limitation on jurisdiction embodied in the *Rooker-Feldman* doctrine is simply inapplicable in cases challenging decisions of state administrative agencies, as opposed to decisions of state courts. The doctrine thus poses no bar to review here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 26, 2001

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[8] *See, e.g., Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1039 (8th Cir. 1999); *In re Lutheran Brotherhood Variable Ins. Prods. Co. Sales Practices Litig.*, 105 F. Supp. 2d 1037, 1043 (D. Minn. 2000).

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Nos. 00-1531 and 00-1711

IN THE
Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

On Writs of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF *AMICUS CURIAE OF THE VIRGINIA STATE CORPORATION COMMISSION*

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IN THE
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UNITED STATES OF AMERICA,
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On Writs of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF *AMICUS CURIAE*

The interest of the Commission in this proceeding is that of a State agency that, pursuant to State constitutional authority and legislation, has the authority to regulate the telecommunications industry in the Commonwealth of Virginia. The Commission's views are not adequately represented by petitioners, respondents or other parties. It is believed that the views contained herein will provide a more complete view of the Constitutional and statutory issues involved.

Respectfully submitted,

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QUESTION PRESENTED IN NOS. 00-1531 & 00-1711

Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996?

STATEMENT OF *AMICUS* INTEREST[1]

The Virginia State Corporation Commission is a State administrative body created by the Constitution of

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[1] Rule 37.6 Statement: William H. Chambliss, General Counsel to the Virginia State Corporation Commission, is the author of this brief. No person or entity other than the Virginia State Corporation Commission has made a monetary contribution to the preparation or submission of this brief.

Virginia and charged with, among other things, the regulation of telecommunications entities within the Commonwealth of Virginia. Va. Const., Art. IX Sec. 1, *et seq.* The Va. Commission continues to be involved in the regulation of telecommunications entities and the creation of competitive markets for the benefit of Virginia consumers. The Constitution of Virginia and Virginia state law confer upon the Commission the authority under state law to order interconnection between carriers operating within the Commonwealth and specifically § 56-38, et seq. of the Code of Virginia authorizes the Commission, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." After the passage of the 1996 Act, the Va. Commission became involved in the arbitration and interpretation of interconnection agreements between competitive local exchange companies ("CLECs"), seeking to enter the local telephone market in Virginia and incumbent local exchange companies ("ILECs").

In *GTE South Inc. v. Morrison*, 6 F. Supp. 2d 517 (E.D. Va. 1998), aff'd 199 F.3d 733 (4th Cir. 1999), the Court held that the Commission in arbitrating interconnection agreements pursuant to § 252 of the 1996 Act, waived any claims of sovereign immunity under the Eleventh Amendment. Subsequently, the Va. Commission has declined to waive sovereign immunity under the Eleventh Amendment of the United States because it has not been empowered by either the Constitution of Virginia or the Code of Virginia to do so.[2] Consequently, the Va.

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[2] *Petition of Starpower Communications, LLC, For declaratory judgment and enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc.*, Case No. PUC990156, 2000 S.C.C. Ann. Rep. 272; *Petition of Starpower Communications, LLC, For declaratory judgment interpreting interconnection agreement with GTE South, Inc.*, Case No. PUC990023; and *Petition of Cox Virginia Telecom, Inc. v. GTE*

Commission is no longer able to enforce § 252 of the Act for arbitration since doing so imperils Virginia's sovereign immunity. Nor does the Va. Commission approve negotiated interconnection agreements under the 1996 Act, but instead relies on state law authority.[3] The Virginia State Corporation Commission offers to conduct arbitration of interconnection agreements pursuant only to existing state law authority.[4] At this time all telecommunications entities offered this option by the Va. Commission have declined said offer, and the Federal Communications Commission is presently arbitrating a Virginia case.[5]

As the success of the opening of competitive markets in the telecommunications industry is dependent upon a well-functioning framework of interdependent regulatory entities and the appropriate recognition to the decisions and

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South Incorporated, For enforcement of interconnection agreement for reciprocal compensation for the termination of local calls to Internet Service Providers, Case No. PUC990046, 2000 S.C.C. Ann. Rep. 263.

[3] Therefore, the Virginia State Corporation Commission awaits this Court's decision on the issue of a state commission's waiver of sovereign immunity by participation in actions pursuant to § 252 of the 1996 Act. It is reasonably believed that other state regulatory bodies are similarly positioned, i.e., without express authority to waive the immunity of their particular state.

[4] Virginia SCC Rules codified at 20 VAC 5-400-180 as "Rules governing the offering of competitive local exchange telephone service" provide for the authority to address interconnection issues under the authority of the Virginia Code. Rules 20 VAC 5-400-180 F 5 and 6 specifically provide for arbitration of contested issues.

[5] *In the matter of Petition of AT&T Communications of Virginia, Inc., For preemption of jurisdiction of the Virginia State Corporation Commission pursuant to § 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-251, DA 01-198, 2001 WL 62694 (F.C.C. January 26, 2001).

authority of the State commissions, the Commission urges this Court to sustain the orders below. The Court of Appeals decision that no waiver of sovereign immunity occurred by State commission participation in the regulation of interconnection agreements is in accord with law and Congressional intent. The Virginia State Corporation Commission supports the position that State commissions must retain the authority to render final orders or decisions which possess full effect and finality under state law. The Court should conclude that neither the 1996 Act nor § 1331 provide a basis for a finding of waiver of sovereign immunity by a state commission fulfilling obligations imposed by the 1996 Act.

SUMMARY OF ARGUMENT

In 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 251 et seq.) to open the local telecommunications markets to competition.[6] The 1996 Act[7]

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[6] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York, and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee, and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau 1996 WL 164625 (F.C.C. April 10, 1996) at page 3. Particularly, the Virginia General Assembly amended § 56-265.4:4 of the Code of Virginia to provide for competition in local exchange telecommunications in 1995. The Va. Commission enacted rules governing the provision of such services; codified at 20 VAC 5-400-180 as "Rules governing the offering of competitive local exchange telephone service".

[7] *See*, 47 U.S.C. §§ 251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. § 251(a). With regard to ILECs, the duty to interconnect is even more specifically defined by § 251(c)(2). (Cite to this assertion)

In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of § 251.

As a State that has been in the forefront of the development and opening of competitive markets in the telecommunications industry,[8] the Commonwealth of Virginia has an important stake in the protection of the framework and relationship between the telecommunications industry, the State commissions, and Federal courts created under the 1996 Act. Virginia likewise has an equally important stake in maintaining sovereignty over the processes of its state judicial and regulatory bodies. The federal district courts have only that jurisdiction that Congress grants through statute. The federal district courts do not possess subject-matter jurisdiction over suits that

[8] As of June, 2001, 200 competitive local exchange companies (CLECs) have certificated in the Commonwealth of Virginia.

challenge, as contrary to federal laws, orders of state public utility commissions interpreting or enforcing interconnection agreements. Congress has not abrogated the State commission's sovereign immunity pursuant to 28 U.S.C. § 1331.

ARGUMENT

I. Federal Courts Do Not Have General Federal Question Jurisdiction To Determine Whether State Commission Determinations Violate the 1996 Act Under § 1331.

The Fourth Circuit held that 28 U.S.C. § 1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. § 252(e)(6).[9] Furthermore, the Court of Appeals held that "the simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. § 1331."[10] Petitioners contend that the federal district courts have jurisdiction under 28 U.S.C. § 1331.[11] The Va Commission maintains that the case before this Court does not meet the requirements for jurisdiction under 28 U.S.C. § 1331.[12]

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[9] Bell Atlantic Maryland, Inc. v. MCI WorldCom Inc., *et al.*, 240 F.3d 279, 309 (4th Cir. 2001).

[10] Id.. at 308.

[11] Section 1331 provides in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions arising under the. . .laws. . .of the United States.

[12] The party seeking the federal forum must establish the basis for the court's jurisdiction. Petitioners have failed to allege that the federal law creates any cause of action. Jurisdiction may not be sustained on a theory that the plaintiff does not advance. *Healy v. Seagull Specialty Co.*, 237 U.S. 479, 480 (1915).

The federal district courts have that jurisdiction which Congress grants through statute. Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

Furthermore, § 1331 jurisdiction may be preempted by a doctrine which requires jurisdiction to reside elsewhere. Congress has not abrogated the State commission's sovereign immunity pursuant to § 1331. The Supreme Court has expressly held that § 1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak,* 501 U.S. 775, 786 (1991). In light of this statement, no reasonable argument could be made that § 1331 constitutes an abrogation of state immunity.

A. There is no private cause of action under the 1996 Act

Even though Congress has conferred general federal question jurisdiction on the federal district courts under 28 U.S.C. § 1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly defined constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue. As this Court has held, "the source of plaintiff's rights must be found. . .in the substantive provisions of the. . .Act which they seek to enforce. . .*Touche Ross & Co. v. Reddington,* 442 U.S. 560, 577 (1979).

Section 1331 should be construed strictly and all doubts should be resolved in favor of State court jurisdiction. *Aetna Inc. Co. v. Chicago RI & PR Co.*, 229 F.2d 584, 586

(10th Cir. 1956). There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exits. *American Well Works Co. v. Layne & Bowber Co.*, 241 U.S. 257, 260 (1916). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal questions. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921).[13]

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans*, 85 F.3d 1119, 1123 (5th Cir 1996). By now, Congress is well aware of this presumption and how to craft statutes that unequivocally do provide private remedies. *See, Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("*Touche*"). Appellants argument relies upon the erroneous assumption that the existence of a federal statute automatically gives rise to § 1331 jurisdiction.[14]

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the factors considered include whether the plaintiff is part of the class for whose special benefit the statute was passed; and whether the indicia of legislative intent reveals a congressional purpose to provide a private cause of action or deny one; whether it is consistent with the underlying legislative scheme to imply such a remedy; and whether the

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[13] Since no state law claims are raised, this second test does not apply.

[14] Petitioners contend in this appeal that if Congress had intended to restrict the jurisdiction of the federal district courts, it would have expressly precluded jurisdiction in the 1996 Act. This argument is obviated by the fact that federal district courts are courts of limited jurisdiction and only possess that jurisdiction granted expressly by Congress.

cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. 66, 78 (1975) ("*Cort*").

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

The legislative history of the 1996 Act establishes that telecommunications entities were not intended to be special beneficiaries of the statute enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (Emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . The result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses**, . . . Indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 4748, *reprinted in* U.S.C.C.A.N. (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers generally and was not intended to specially benefit ILECs such as BA-MD.

Furthermore, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a general private cause of action. No language in the Act supports such an argument. There are limited express grants of federal jurisdiction in the 1996 Act[15] but, as pertinent here, one such grant is limited[16] to suits brought by parties to interconnection agreements. 47 U.S.C. § 252(e)(6). Under § 252(e)(6), a district court's review of a State Commission's approval or rejection of an interconnection agreement is limited to whether the agreement meets the requirements of §§ 251 and 252. Such review is narrowly construed and does not cover other aspects of a State Commission's decision, such as consistency with State law, or matters covered in § 253. *See, Southwestern Bell Telephone,* 225 F.3d 942. Therefore, § 252(e)(6) is a limited jurisdictional provision.

Aside from the narrow remedy contained in § 252(e)(6), the 1996 Act also explicitly provides for federal

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[15] Section 252(e)(6) provides, in pertinent part, in any case in which a State Commission makes a determination under this section, any party injured by such decision may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251.

[16] The district courts have construed § 252(e)(6) narrowly. *See, e.g. Citizen's Utility Ratepayers Board v. McKee,* 946 F. Supp. 89 (D. Kan. 1996) (Plaintiff is not an aggrieved party under § 252(e)(6); only the interconnecting service provider or affected local exchange carriers has standing.)

court jurisdiction in two other sections. Section 274 creates federal jurisdiction in the electronic publishing area and Section 207 creates the same jurisdiction over interstate communications disputes. That Congress expressly provided for a specific right of access to the federal courts in § 252(e)(6) and the other sections noted above is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

The conclusion that Congress did not intend to create a private cause of action is further supported by the fact that Congress considered but failed to include a private right of action in the 1996 Act for violations of an interconnection agreement. Section 257 of the Senate Bill expressly provided for a general private right of action. S. Rep. No. 23, 104th Cong., 1st Sess., 1995 at 104-05 (March 30, 1995). However, this provision was not enacted in the final legislation. Congress' express grant of federal rights of action in the three sections of the 1996 Act while deleting a general provision from the Senate Bill, demonstrates that Congress did not intend to create an implied cause of action.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). Nor is there any evidence that Congress anticipated that there would be a private remedy.

This being the case, it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of

interest. These factors are only of relevance if the first two factors give indication of Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

The conclusion that the 1996 Act does not create a private cause of action negates any claim of federal subject matter jurisdiction.[17] In the absence of a federal statutory cause of action, declaratory relief by a federal court is available only when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any state regulation of matters within the scope of the federal statute. *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). See, also *Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2d Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

No reasonable argument could be made contending that the 1996 Act entirely preempts state regulation of local exchange service or local exchange carriers. Among a variety of other things, § 252 requires a state commission to determine wholesale rates in the context of an arbitration. *See, e.g.*, §§ 251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters

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[17] This Court held that the Federal Communications Act of 1934 "does not create new private rights". *See Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 14 (1942).

falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. § 1331 and therefore uphold the decision of the Court of Appeals.

II. The *Rooker-Feldman* Doctrine Was Properly Applied By the Fourth Circuit.

The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the Supreme Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. In 1983, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), clarifying *Rooker* and giving the *Rooker-Feldman* doctrine its name. In *Feldman*, the Supreme Court held that lower federal courts have no jurisdiction to hear "challenges to state court decisions in particular cases arising out of judicial proceedings", *Id.* at 486, or decide questions "inextricably intertwined" with State court judgments. *Id.* at 483 n. 16.

The *Rooker-Feldman* doctrine is founded on two main inferences derived from provisions of Title 28 of the United States Code. The first inference is that 28 U.S.C. § 1257, which gives the Supreme Court appellate review of certain State court decisions, is the only federal statute that explicitly provides for federal review of state court decisions. Congress granted original jurisdiction to federal district courts under a variety of statutes, including 28 U.S.C. §§ 1331 and 1332. Under this statutory scheme, federal district courts are courts of original, not appellate jurisdiction. Thus, by inference, 28 U.S.C. § 1257 granted jurisdiction exclusively to the Supreme Court to review final judgments or decrees from the highest court in a state. The

second inference is that Congress intended to foreclose all other forms of federal court review of state decisions. Because Congress only gave the Supreme Court the explicit authority to review the decisions of a state court, Congress meant to deny all other federal courts that power.

Thus, the *Rooker-Feldman* doctrine is an extension of the principle that federal courts are courts of limited jurisdiction. Also underlying the *Rooker-Feldman* doctrine is the idea of federalism. The doctrine is designed to preserve the two distinct legal systems so that each may proceed independently of the other with the Supreme Court as the final arbiter of any federal questions raised in either system. The policy reasons that underlie the doctrine apply just as readily to state agency decisions rendered in quasi-judicial proceedings as they do to State court decisions.

The *Feldman* Court found that the federal district court was "without authority to review final determinations of the [D.C. Court] in judicial proceedings. Review of such determinations can be obtained only in this Court. *See*, 28 U.S.C. § 1257." *Feldman*, 460 U.S. at 476. In reaching this conclusion, the Supreme Court analyzed the crucial question whether the proceedings before the D.C. Court "were judicial in nature" so as to bring these proceedings under the ambit of *Rooker*.

The leading case relied upon by the *Feldman* Court was *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), where the Supreme Court acknowledge that your *amici*, the Virginia State Corporation Commission, is at least for some purposes, a court. 211 U.S. at 224. *Prentis* also held that:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist .... Legislation on the other hand looks

> to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

211 U.S. at 226. The *Feldman* Court agreed with the *Prentis* finding that the question regarding whether a proceeding is judicial in nature "depends not upon the character of the body but upon the character of the proceedings." 460 U.S. at 477. The *Feldman* Court found that the proceedings at issue were judicial in nature because the tribunal "was called upon to **investigate, declare and enforce** liabilities as they stood on present or past facts and under laws supposed already to exist." *Feldman*, 460 U.S. at 479. Consequently, the *Feldman* Court ruled that the district court lacked subject matter jurisdiction over applicants' claims for individual relief.

The Va. Commission has the powers of a court of record to administer oaths, compel the attendance of witnesses and production of documents, punish for contempt, and enforce compliance with its orders through fines and other penalties as prescribed or authorized by law.[18] This Court has recognized that state agencies perform judicial acts in *FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982). The *Rooker-Feldman* doctrine preserves the autonomy of both sovereigns and prevents undue incursions of federal courts upon lower courts. The Fourth Circuit recognized the judicial nature of state commissions' proceedings and properly found that federalism requires the federal district courts to refrain from taking jurisdiction in cases involving state commissions.

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[18] Code of Virginia § 12.1-13.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VERIZON MARYLAND, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al.*,

Respondents.

UNITED STATES OF AMERICA

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, *et al*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The State of Illinois has a strong interest in the manner in which the regulation of local telephone service is conducted, both generally and in this case. The members of the Illinois Commerce Commission, the agency of the state of Illinois that is charged with the task of public utility regulation, are the Petitioners in the case to be argued in tandem with the instant case, *Mathias v. WorldCom Technologies, Inc.*, No. 00-878. The question presented in this case involves an alternative argument for federal district court jurisdiction to review state commission decisions to that put forth by the Respondents in *Mathias* based on 47 U.S.C. § 252(e)(6). The commissioners, and therefore the State of Illinois, seek to assist in persuading this Court not to find such jurisdiction by that alternate route in this case.

Aside from that specific interest, the State of Illinois, through the Illinois Commerce Commission, has been an active regulator of local telephone service for decades. It has long sought to regulate that form of commerce in accordance with state law and in harmony with federal laws and regulations. The State of Illinois believes that the Telecommunications Act of 1996 sets forth an allocation of responsibilities between federal and state institutions that, while no doubt different from that which preceded it, continues to maintain a balance between state and federal interests. The State of Illinois believes that the 1996 Act was designed to continue federal respect for state sovereignty, and is strongly interested in ensuring that 28 U.S.C. § 1331 is construed in a way that promotes that legislative design.

SUMMARY OF THE ARGUMENT

In this case, Petitioner Verizon seeks federal district court review of an order by the Maryland Public Service Commission, a state agency. Neither § 252(e)(6) of the Telecommunications Act of 1996 nor 28 U.S.C. § 1331, the general federal question statute, confers subject matter jurisdiction on federal district courts to hear appeals from state commission orders interpreting or enforcing interconnection agreements. In fact, Verizon's appeal is a routine appeal of the Maryland commission's order that is reviewed exclusively by Maryland courts.

Under Article III, Congress has sole responsibility for determining the jurisdiction of the lower federal courts. Congress also determines when private parties are to be given causes of action under legislation it adopts. When Congress intends not to create a private right of action, federal court must respect that decision and not assume the legislative function of creating one, lest they risk enlarging their jurisdiction. The Federal Judiciary, as one of three co-equal branches of the Federal Government, must be vigilant to ensure against such encroachment, which reflects a consideration for separation of powers principles. And when the Federal Judiciary is called upon to determine whether Congress intended to create a private right of action against the States, that request also implicates substantial federalism principles and the Court must be especially attentive to the States' status as sovereigns. Here, Petitioners ask the Court to relax its vigilance and find a private right of action where none exists. In fact, Petitioners argue not only for a private cause of action under the Telecommunications Act of 1996, where Congress intended none, but also for a private right of action against the States. Neither argument is well-founded.

1. Sections 251 and 252 of the 1996 Act do not create private rights of action. Section 251 imposes obligations on incumbent local telephone exchange carriers such as Petitioner Verizon to new entrants such as MCI WorldCom. Those obligations may be implemented through interconnection agreements reached under § 252's negotiation and arbitration procedures or reached without regard to the standards set forth in § 251. Either way, federal law creates the duty to enter into agreements and allocates to the contracting parties, in the first instance, the responsibility to negotiate the terms and conditions of their agreements. Leaving the details of the agreement to the contracting parties, Congress intended that traditional state law contract principles would govern their relationship, and, correspondingly, that state law would provide the remedy for violation of the agreement. As a consequence, the 1996 Act does not create private rights of action for breaches of those agreements.

And, more particularly, §§ 251 and 252 do not create private rights of action against *state commissions* for review of their orders interpreting or enforcing agreements. Congress carefully tailored a limited federal remedial scheme that permits federal review of state commission determinations involving the approval or rejection of an agreement, and even then the review is limited to determining whether the agreement meets the requirements of §§ 251 and 252. *See* 47 U.S.C. § 252(e)(6). In carefully tailoring review under § 252(e)(6) to apply only to state commission determinations approving or rejecting agreements, Congress intended to preclude alternative means of federal review. The review under § 252(e)(6) does not include federal district court review of state commission orders deciding disputes over the meaning of the terms in those agreements. Rather, Congress left supervision of the performance of the agreements to the

States, adjudication of disputes to state commissions, and subsequent judicial review to state courts. To allow carriers to obtain review of state commission decisions interpreting or enforcing agreements under § 1331, when Congress intended for those decisions to be reviewed by state courts, would cast aside the statutory scheme and render superfluous the limited statutory review provided under § 252(e)(6).

2. Besides the lack of private rights of action under §§ 251 and 252, Verizon's complaint seeks appellate review of the Maryland commission's order that is not within a federal district court's original jurisdiction under § 1331. Although Verizon styles its action as a complaint for declaratory relief, it merely seeks review and correction of the Maryland commission's order. "Federal courts have no general appellate authority over state courts or state agencies." *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985). The claims Verizon considers to be federal claims were raised, litigated, and decided at the Maryland commission. Verizon alleges no federal claims separate and distinct from defenses it raised and the Maryland commission decided. Therefore, its claims are bound by the administrative record before the Maryland commission and, accordingly, its complaint for review is not with a federal district court's original jurisdiction.

In addition, Verizon's complaint seeking judicial review of the Maryland commission's order is not a "civil action" within the meaning of § 1331. Maryland courts exercise a special statutory jurisdiction that provides for a deferential review of the Maryland commission's findings and conclusions. As a consequence, Verizon's complaint for review is one for appellate review of the Maryland commission's order and not a "civil action" as required by § 1331. The review Verizon seeks here is a continuation of the administrative

proceedings before the Maryland Commission and, therefore, does not come within § 1331.

ARGUMENT

Under the federal Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Alexander v. Sandoval, 532 U.S. 275, __, 121 S. Ct. 1511, 1519-20 (2001) (internal citations and quotation marks omitted). It is to be presumed that a cause lies outside this limited jurisdiction, and the burden rests upon the party asserting jurisdiction to establish the contrary. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

I. THE 1996 ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST STATE COMMISSIONS FOR REVIEW OF THEIR DECISIONS INTERPRETING AND ENFORCING INTERCONNECTION AGREEMENTS.

The briefs filed by Petitioners in this case begin their analysis of the question presented in the middle. Petitioners assume that federal law creates a private right of action for breach of interconnection agreements, and then proceed to argue in favor of jurisdiction in the federal courts to review decisions of state commissions considering such claims. Because federal law creates no such right, the Court need not consider whether the federal district courts have jurisdiction under 28 U.S.C. § 1331 to afford Petitioners a remedy for its violation.

Sections 251 and 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("1996 Act") do not create independent, private rights of action upon which to base federal court subject matter jurisdiction. Section 251 establishes *obligations* of incumbent local exchange carriers ("LECs") such as Verizon to new entrants such as MCI WorldCom, and those *obligations* may be implemented through interconnection agreements reached under § 252's negotiation and arbitration procedures. Or, an incumbent LEC and a new entrant may negotiate and enter into an agreement without regard to the standards in §§ 251(b) and (c). In either case, "[t]he Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out." *Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999), *amended*, 1999 U.S. App. LEXIS 20635 (Aug. 19, 1999), *cert. granted sub nom.*

Mathias v. WorldCom Tech., 121 S. Ct. 1224 (2000). Thus, federal law creates the duty to enter into agreements, and Congress left it to the contracting parties, in the first instance, to settle on the particular terms and conditions of their agreement.

Congress, however, did not create a federal private right of action for breach of agreements in the 1996 Act. Leaving the details of agreements to the parties, Congress intended that traditional state law contract principles govern their ensuing relationships. Quite naturally, Congress intended that state law would provide the remedy for violation of the agreements. The right of carriers to seek redress for violations regarding the performance of their agreements arises under state law. Simply put, the 1996 Act does not create a private right of action for injuries resulting from the parties' performance under their agreements.

Likewise, and particularly relevant here, nothing in the 1996 Act gives private parties a direct cause of action against state commissions for review of their orders regarding the performance of agreements. As explained more fully in the Brief of Petitioners in *Mathias v. WorldCom Technologies, Inc.*, No 00-878, at pp. 16-26, Congress in the 1996 Act carefully crafted a limited federal remedial scheme for review of state commission determinations made under § 252—that is, state commission determinations involving the formation of agreements. A state commission acts "under section 252" when a carrier i) requests mediation (§ 252(a)(2)), ii) petitions for arbitration (§ 252(b)(1)), or iii) submits an agreement for approval (§ 252(e)(1)). The provisions of § 252 are quite specific in their application and do not address obligations of the parties or of the state commissions that go beyond those listed in that section in connection with interconnection agreements. Indeed, even insofar as it pro-

vides for district court review of state commission decisions regarding the formation of agreements, § 252(e)(6) provides for determinations limited to whether the agreement at issue "meets the requirements of" §§ 251 and 252.

The language, structure and purpose of the 1996 Act therefore make unmistakably clear that Congress considered the issue and did not intend to create a private right of action for federal review of state commission decisions interpreting or enforcing agreements. In carefully tailoring review under § 252(e)(6) to apply only to state commission determinations approving or rejecting agreements, Congress intended to preclude alternative means of federal review. As the Fourth Circuit cogently explained below, "[i]t would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. § 1331 override this effort." Pet. App. 48a. Thus, exercising federal question jurisdiction under § 1331 to allow federal review of state commission orders adjudicating disputes over the performance of agreements would represent an impermissible end-run around that limited framework.

Nor can a private right of action be implied under the 1996 Act. The central inquiry where rights of action may be implied remains whether Congress intended to create a private right of action. The Court in *Cort v. Ash*, 422 U.S. 66 (1975), has prescribed the relevant inquiry:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute was enacted- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indi-

> cation of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations and internal quotation marks omitted).

Nowhere in the text of § 251 or § 252, or in their legislative history is there an indication that Congress intended to create a private right of action for violations of their provisions, let alone one that permitted federal review of state commission orders interpreting or enforcing agreements. First, the 1996 Act was enacted for the benefit of consumers and not telephone service providers. Congress described the purpose of the Act as follows: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (purpose statement). Nonetheless, Congress sought to accomplish this purpose in the 1996 Act by regulating the conduct of those providers. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander,* 532 U.S. at __, 121 S. Ct. at 1521 *(quoting California v. Sierra Club*, 451 U.S. 287, 294 (1981)). The 1996 Act regulates telecommunications carriers, with emphasis on LECs and particular emphasis on incumbent LECs such as Verizon, with the goal of further opening local telephone markets to competition, for the ulti-

mate benefit of local telephone users. *See* § 251(b) (establishing obligations on LECs); *id.* § 251(c) (establishing additional obligations on incumbent LECs). Thus, the 1996 Act, in particular the statutes at issue here, was enacted for the benefit of consumers, not for the benefit of LECs, especially incumbent LECs such as Verizon.

Second, as explained above, nowhere in the text of the 1996 Act does Congress create a private right of action for the claims alleged here. In addition, the legislative history reveals that Congress considered, but decided against, creating private rights of action for violations of 47 U.S.C. § 251. S. Rep. No. 652, 104th Cong., 1st Sess. 46-47, 104-05 (1995) (discussing § 224 of the Senate bill adding proposed § 257 to 47 U.S.C.). Proposed § 257 created private rights of action for violations of § 251 (which in that bill also included much of what now is 47 U.S.C. § 252), including an action based on the failure of a carrier to comply with the terms of an approved agreement, that would have been enforceable by carriers in the federal district courts. Proposed § 257(c) made those rights enforceable by injured persons through civil actions in federal districts courts. Before the 1996 Act was enacted, however, Congress deleted proposed § 257 and added § 252(e)(6) instead. Congress' action in deleting proposed § 257 and adding § 252(e)(6) is compelling evidence that Congress did not intend to create private rights of action in the 1996 Act.

The Court has indicated that where the first two factors are resolved in the negative, it is unnecessary to consider the remaining factors and the inquiry is at an end. *Touche Ross & Co. v. Redington*, 442 U.S. 577, 575-76 (1979); *id.* at 579-80 (Brennan, J., concurring). Thus, the Court need go no further in this case. Because Congress created no private right of action in favor of carriers either to enforce the obligations

in § 251 against each other in federal court or for federal review of state commission decisions interpreting or enforcing agreements, the issue of whether 28 U.S.C. §1331 provides for jurisdiction to enforce that non-existent right is a moot point.

Notwithstanding, Petitioner Verizon advances two arguments in support of its contention that jurisdiction exists under § 1331, neither of which has merit. (Neither Petitioners MCI nor the United States joins Verizon in making these arguments.). First, Verizon contends that it has a federal statutory right to enter into a "binding" agreement under § 252(a)(1).[1] Verizon Br. at 17. On the contrary, the 1996 Act imposes a duty on Verizon to negotiate and enter into agreements upon request. § 251(c)(1); § 252(f)(5) (duty to negotiate an agreement not affected by submitting statement of generally available terms). Although § 252(a)(1) allows an incumbent LEC to enter into an agreement without regard to the substantive standards in §§ 251(b) and (c), it does not alter the fact that a duty nonetheless exists to enter into an agreement, nor does it somehow transform that duty into a right. An agreement entered into with regard to the Act or one whose terms are imposed in arbitration is no less binding on the parties than an agreement entered into without regard to the 1996 Act. Verizon may not shirk its duty merely by claiming the duty is a right. Unlike a right, Verizon may not unilaterally waive or relinquish its obligations under the

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[1] It is odd that Verizon claims a violation of § 252(a)(1) when it consistently has maintained that the disputed reciprocal compensation provisions at issue in this case were negotiated *with regard* to the Act. *See* Verizon Br. at 19 (contending that that the reciprocal compensation provisions in its agreement reflect an "express incorporation of the federal statutory standard.").

1996 Act. Moreover, as explained above, Verizon is not in the class for whose special benefit the statute was enacted. The 1996 Act was enacted to benefit telephone customers, not Verizon. Accordingly, Verizon has no federal statutory right under 252(a)(1) and its contention is without merit.[2]

The gravamen of Verizon's second contention is that the agreements are federal contracts, and any claim based on those contracts arises under federal law. Verizon Br. at 20-25. Although the 1996 Act imposes a duty on incumbent LECs to enter into agreements upon request, it does not impose specific obligations that contracting parties can enforce against each other independent of the terms and conditions of the agreement. Congress intended to encourage private negotiation of agreements and established minimum standards incumbent LECs must agree to provide if sought by a requesting carrier. But the actual details are left to the contracting parties. Section 252(a)(1) specifically allows carriers to enter into agreements without regard to the substantive standards in §§ 251(b) and (c). If Congress had in-

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[2] Verizon further contends (and assumes a federal right of action) that the construction of federal statutory language incorporated into an agreement presents a federal question. Verizon Br. at 19-20. The Court rejected a similar argument in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986), holding that merely because a tribunal must interpret federal law or federal regulations to determine the merits of a state cause of action is insufficient to confer federal question jurisdiction. Here of course, Congress intended for violations of agreements to be brought under state law. There is no private right of action for violation of § 251 or § 252 other than a right stemming from the agreement. Verizon sought a declaratory ruling from the MPSC regarding its agreement, the MPSC interpreted the agreement, and review of that decision must be had in the state courts of Maryland.

tended to impose and enforce federal standards, it could have simply mandated detailed federal standards, rather than allowed the parties to negotiate privately terms and conditions in particular agreements with or without regard to those standards.

Even the mandatory incorporation of federal standards into a contract (which, of course is not the case here) does not, in and of itself, create federal jurisdiction in a contract action based on an alleged violation of those standards. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *Jackson Transit Auth.v. Local Div.* 1285, *Amalgamated Transit Union*, 457 U.S. 15, 29 (1982). The touchstone is congressional intent and, here, Congress intended that the agreements be governed by state law. Indeed, as implemented, the agreements themselves specifically provide that they are governed by state law, and disputes about the meaning of their terms and conditions arise under state law. As the Fourth Circuit explained:

> It is a question of State law, however, whether the interconnection agreement at issue in this case includes a dynamic incorporation of statutory interpretation, including the definition of which calls constitute local calls subject to reciprocal compensation.....The State commission construed the agreement at issue in this case in accordance with its conclusions about the parties' intent on the issue of how to classify ISP-bound calls.

Pet. App. 27a.

There is absolutely no support in the text and structure of the 1996 Act for the notion that Congress intended to carve out

and "federalize" a special category of state contract law involving telecommunications.[3]

Verizon's argument relies on the undefended premise that agreements are not truly voluntarily negotiated, but reflect merely federal regulatory obligations. In Verizon's view, interconnection agreements will almost always mirror the requirements of the 1996 Act because incumbent LECs will give no more than the Act requires, and competing LECs will accept no less. Verizon Br. at 3-5. This idea, however, ignores the real world cost-benefit analysis employed in contracting. Contracting parties commonly forego those items or terms to which they believe they may be entitled or may be able to obtain in negotiation in exchange for other items or terms they perceive to be more valuable. These exchanges and concessions are the essence of negotiation, and are permissible under the Act. It is certainly conceivable that, among other things, the carriers weighed the expected costs to secure an item (here, the costs of compulsory arbitration and possible further litigation in the courts) and the probability of actually receiving a favorable decision against the expected value of the item. Clearly, the benefit of obtaining a particular item to which one is entitled (or retaining

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[3] Moreover, agreements contain many provisions, *e.g.*, dispute resolution, indemnification, limitation of liability, that are not federal obligations. Further, § 252(e)(3) expressly allows state commissions to "establish[ ] or enforce[ ] *other* requirements of State law" in their review of agreements submitted for approval under § 252(e)(1). 47 U.S.C. § 252 (e)(3) (emphasis added). Hence, that section presumes agreements would be governed by state law even before state commissions begin their review. As a consequence, Verizon's argument that *any* claim based on an agreement arises under federal law most surely is incorrect.

an item one is not required to give up) may be substantially outweighed by the costs of actually securing it (or retaining it).

In addition, incentives likely exist for both competing LECs and incumbent LECs to voluntarily enter agreements that do not necessarily "mirror" the requirements of the 1996 Act. For example, competing LECs may have an incentive to take less than what they are entitled to not only to lower costs, but also to gain the ability to enter the local market more quickly and begin providing service in competition with the incumbent. Indeed, in Illinois, shortly after passage of the 1996 Act, three of the carriers who are parties in *Mathias,* Teleport Communications Group, Inc., Focal Communications Corp. and MFS Intelenet of Illinois (predecessor to MCI WorldCom) executed privately negotiated agreements with Ameritech Illinois and promptly began providing service under them.

To be sure, incumbent LECs may be motivated to protect their monopolies, but Congress recognized this and provided the statutory framework to redress the disparity in bargaining strength. Besides the prospect of compulsory arbitration, Congress provided an additional, more powerful incentive for incumbent LECs to cooperate and open their markets to competition: entry into the in-region long distance market. Verizon, as an incumbent LEC, may have a strong incentive to give more than the minimum requirements of the 1996 Act in order to persuade regulators that it has opened its local market to competition and, therefore, win approval to enter the long-distance market under § 271 of the 1996 Act. Verizon, along with the other Regional Bell Operating Companies, have been clamoring to gain entry to the lucrative long distance market, and it is this "carrot- and-stick" approach to opening telecommunications markets that the 1996 Act

adopts. 47 U.S.C. § 153(4); *see BellSouth Corp. v. FCC*, 144 F.3d 58, 60-61 (D.C. Cir. 1998); *SBC Communications Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998).

Verizon also equates agreements with federal tariffs, going so far as to assert that "1996 Act interconnection agreements function in all material respects as federal tariffs." Verizon Br. at 26. Significantly, however, Verizon does not assert that the services in agreements are *actually* set forth in federal tariffs filed with the FCC. They are not. The agreements are for the provision of local telephone service. The rates, terms and conditions of local services incumbent LECs offer, including those required by § 251, are, to the extent required, set forth in state tariffs filed with state commissions, not in federal tariffs filed with the FCC. *See* 47 U.S.C. § 203 (requiring tariffs filed with the FCC for *interstate* services); *id.* § 152(b) (preserving state authority over intrastate services). In Illinois, for example, the interconnection, unbundled network element and resale service obligations of § 251 that incumbent Ameritech Illinois provides in its interconnection agreements are also set forth in state tariffs filed and administered by the Illinois Commerce Commission ("ICC"). Illinois Bell Telephone Company Tariff No. 20, Part 19 (setting forth the terms and conditions for unbundled network elements) (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html?pid=260); *see, e.g.*, Michigan Bell Telephone Co., Tariff No. 20, Part 19 (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html?pid=282); *see generally* SBC tariffs (available at http://www.sbc.com/PublicAffairs/PublicPolicy/Tariffs2/1,3950,281,00.html).

Other provisions of the 1996 Act demonstrate that interconnection agreements are not federal tariffs. Section 252(h) requires that approved agreements be filed with state commissions, not the FCC. Furthermore, § 252(f)(1) permits Bell operating companies such as Verizon to file statements of generally available terms ("SGAT") setting forth the terms and conditions offered to comply with its obligations under § 251. Under § 252(f), those SGATs are also filed with state commissions, not the FCC. *See, e.g.*, Bell Atlantic SGAT filed in Maryland (available at http://www.bellatlantic.com/tariffs_info/intra/efftar/md/sgat/index.htm). To be sure, suits to enforce tariffs filed with the FCC have been held to arise under federal law. *E.g.*, *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998). By parity of reasoning, suits to enforce agreements, which are filed with state commissions, and whose services are also set forth in state tariffs, arise under state law.

Petitioner MCI's reliance on *Jackson Transit* in support of its contention that the district court had jurisdiction under § 1331 to hear Verizon's complaint against the Maryland Public Service Commission ("MPSC") is misplaced. MCI Br. at 21-22. Under § 13(c) of the Urban Mass Transportation Act of 1964, state and local governments were required to make arrangements to preserve transit workers' existing collective bargaining rights as a condition for receipt of federal funds before acquiring a privately-owned transit company. *Jackson Transit*, 457 U.S. at 16. Jackson Transit Authority entered into a § 13(c) agreement guaranteeing the existence of its workers' bargaining rights and a collective bargaining contract with the union. *Id.* at 18-19. Unlike in *Jackson Transit*, where the existence of a federal right was not disputed, Verizon claims a federal right where none exists. Section 251 imposes obligations on Verizon; it does not be-

stow rights, and certainly none that can be enforced against state commissions that apply here. Cf. § 252(e)(6) (providing for judicial review of state commission determinations made in the approval process). Furthermore, the local government entity in *Jackson Transit* was a party to the § 13(c) contract. 457 U.S. at 19. Here, of course, the MPSC is not a party to the agreement; instead, it was the state adjudicator of the parties' dispute over the meaning of the agreement. The 1996 Act does not give Verizon, or LECs (incumbents and new entrants) in general, a federal right to a particular outcome in disputes between themselves over agreements that is enforceable against state commissions in federal court.

II. FEDERAL DISTRICT COURTS LACK JURISDICTION UNDER 28 U.S.C. § 1331 TO REVIEW STATE COMMISSION ORDERS INTERPRETING OR ENFORCING INTERCONNECTION AGREEMENTS.

Even if the Court were to accept Petitioners' view of the 1996 Act and find a private right of action, the most weight that construction could bear is that the parties to an agreement could bring an action against each other in federal court, not against state commissions for review of their orders. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. Subject matter jurisdiction under § 1331 does not exist because Verizon's appeal of the MPSC's order 1) is not within a federal district court's "original jurisdiction," and 2) is not a "civil action" as required by § 1331. The review Verizon seeks here is a continuation of the administrative proceedings before the MPSC. As a result, it does not come within § 1331.

A. Verizon's Appeal Is Not Within a Federal District Court's Original Jurisdiction.

A federal issue raised, litigated and decided before a state administrative agency (or for that matter a state court) does not qualify as a federal question within a district court's *original jurisdiction* under § 1331 merely by restating that federal issue in a complaint filed in federal court. Verizon raised and fully litigated at the MPSC the allegations contained in its complaint. In turn, the MPSC considered and rejected Verizon's arguments on the merits. Verizon does not argue that it has alleged in its complaint a federal or constitutional claim different from those federal issues it raised at the MPSC. It merely seeks appellate review of state and federal issues decided by the MPSC and correction of the MPSC's order.

The nub of Petitioners' argument is that, since Verizon has alleged claims "arising under the Constitution, laws or treaties of the United States," it has met the requirements of §1331. Verizon Br. at 11, 16, United States Br. at 17-18; MCI Br. at 16-18. Their undefended premise is that the mere allegation of a federal question without regard to whether that federal question was previously litigated in and decided by a state agency establishes jurisdiction under § 1331. This premise is erroneous. Verizon impermissibly seeks to bootstrap federal defenses raised, fully litigated, and rejected at the MPSC into federal questions within a district court's "original" jurisdiction. However, because it fails to allege a federal question *separate and distinct* from the federal defenses raised and decided at the MPSC, it fails to satisfy the requirements of § 1331. Petitioners ignore the fundamental legal principle that "[f]ederal courts have no general appellate authority over state courts or state agencies." *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985).

More particularly, federal district courts, as courts of original jurisdiction, do not have appellate power, and are without jurisdiction to review on appeal action taken administratively or judicially in a state proceeding. *See Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 354-55 (1961); *Chicago, R.I. & P. Co. v. Stude*, 346 U.S. 574, 581 (1954). Cross-system appellate authority is entrusted solely to this Court, not to the lower federal courts.

In its complaint, Verizon seeks just that: appellate review of the MPSC's order in federal district court. In Count I, Verizon alleges that the MPSC violated federal law by misapplying relevant FCC decisions in interpreting language in Verizon's interconnection agreements. Complt. ¶¶ 5, 39-40. Count II alleges the MPSC violated federal law by misreading the FCC's ruling to require the MPSC to impose reciprocal compensation for ISP-bound calls. *Id.* ¶¶ 6, 41-42. The claims Verizon considers to be federal claims were raised, fully litigated, and rejected by the MPSC. Verizon merely seeks review and correction of the MPSC's order. As a result, its claims are bound by the administrative record before the MPSC. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 167-68 (1997) (finding property owners' federal claims not originally brought before the state administrative agency were not bound by the administrative record).

Petitioners, however, contend that *International College of Surgeons* supports jurisdiction to review the MPSC's order. Verizon Br. at 35-38; MCI Br. at 26; United States Br. at 25. However, the critical difference between *International College of Surgeons* and this case is that in the former case, plaintiffs raised their federal claims for the first time in court after the administrative proceedings at the agency had concluded. Respondents International College of Surgeons and

a related organization (collectively "ICS") applied for permits to demolish two buildings on properties it owns in Chicago, which had been designated by city ordinance as historic landmarks. 522 U.S. at 159-60. The Commission on Chicago Historical and Architectural Landmarks ("Landmarks Commission"), to which the application was forwarded, denied those permit requests. *Id.* at 160. ICS then filed a complaint in the Circuit Court for Cook County seeking judicial review of the Landmark Commission's administrative decision to deny the permits. It also raised for the first time in its complaint several federal constitutional challenges. *International College of Surgeons v. City of Chicago*, Nos. 91 C 1587, 91 C 5564 (cons.), 1992 WL 6729, at *2-3 (N.D. Ill. Jan. 10, 1992).

Following the denial of its permit request, ICS filed an application seeking an economic hardship exception to the Landmark Commission's denial of the demolition permits. *Id.* at *2. The Landmark Commission denied ICS' application. ICS then filed a second complaint in the Court for Cook County seeking judicial review of the Landmark Commission's administrative decision to deny the economic exception. *Id.* at *3. It also raised for the first time in its complaint facial and as-applied federal constitutional challenges to Chicago's Landmarks Ordinance. *Id.* Consequently, the district court's original jurisdiction derived from ICS' federal claims, filed for the first time in the circuit court, which were not decided by the Landmarks Commission and, therefore, were not part of the administrative record.

Whether a federal question is within a district court's original jurisdiction turns not on whether evidence outside the administrative record may be considered, but rather on which issues and claims themselves are part of the adminis-

trative record. In this case, all of Verizon's federal claims are part of the administrative record and it alleges no federal question independent of the federal issues decided in the administrative record that would establish federal question jurisdiction under § 1331. Thus, because Verizon's complaint asks this Court to reconsider federal issues already litigated and decided at the MPSC it does not come within the Court's original jurisdiction. *See International College of Surgeons*, 522 U.S. at 167-68.

The cases Petitioners rely on purportedly to establish federal jurisdiction serve only to highlight the differences between this case and federal question cases properly within a district court's "original jurisdiction" under § 1331. For example, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), several airline companies brought suit in federal district court for a declaratory judgment alleging that New York's Human Rights Law was preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 92-93. Similarly, in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), Lawrence County initially brought suit in federal district court for a declaratory judgment that a South Dakota statute conflicted with a federal statute. *Id.* at 259 & n.6. In both cases the federal questions were first brought in the district court and thus were not previously decided by a state court or administrative agency. As a result, the federal claims were properly within the district court's original jurisdiction under § 1331.[4]

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[4] Of course, that the suits were merely filed in district court does not determine whether the suit is within the court's original jurisdiction. The suits could have been filed in a state trial court and removed by defendants pursuant to 28 U.S.C. § 1441. The controlling factor is whether the federal questions were previously

In contrast, the claims Verizon asserts to be federal questions were previously litigated and decided at the MPSC. As a consequence, they are not within the district court's "original jurisdiction." Indeed, if the district court were to consider the questions, as Verizon requests, it would necessarily involve the court in reconsidering the MPSC's decisions on the federal issues and, accordingly, require it to conduct an appellate review. However, it is precisely this "appellate" jurisdiction which § 1331 expressly precludes.

A more analogous scenario illustrates the point. If, for example, the airlines in *Shaw* and the county in *Lawrence County* had chosen to file their federal preemption suits initially in state court, litigated the suits in state court and lost, they could not thereafter seek review in federal district court on those same claims under § 1331. The reason is simple: the district court would lack original jurisdiction. The court would be performing an appellate review of the state court's decision, and it is precisely this "appellate" jurisdiction which § 1331 expressly precludes. Further review of the state court's decision on the federal preemption claims would lie only in the state appellate system, with federal review possible only in the U.S. Supreme Court. *Lynx v. La-Porte Superior Court No. 2*, 789 F.2d 554, 563 (7th Cir. 1986). In this case, the MPSC, like the state trial court in the above example, decided all of the issues Verizon alleges in its complaint. The sole means for obtaining review of the MPSC's decision is prescribed by Maryland law, Md. Code

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decided by a state court or administrative agency. If the federal questions were already decided by a state court or agency then the suits are not within the district court's original jurisdiction under § 1331.

Ann., Pub. Util. Co., § 3-203 (2001), which fixes administrative review exclusively in Maryland state court.[5]

The events in *Mathias* are particularly instructive. After the ICC issued its decision, Ameritech Illinois filed a Petition for Review of the ICC's order in the Illinois Appellate Court. It also filed a complaint for review of the ICC's order in federal district court. It is inconceivable how Ameritech Illinois' appeal can simultaneously constitute an appeal in state appellate court under the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.*, and an action within a federal district court's original jurisdiction under 28 U.S.C. § 1331. Unlike the situation in *International College of Surgeons*, where ICS filed a complaint in circuit court alleging, for the first time, federal claims and seeking judicial review of the Landmark Commission's decisions, Ameritech Illinois filed a petition for review of the ICC's order in state appellate court seeking review of federal and state law questions decided by the ICC, not a complaint in circuit court alleging federal claims different from those issues it raised and litigated before the ICC.

B. Review of the MPSC's Order Is Not A "Civil Action" Under 28 U.S.C. § 1331.

Verizon's action seeking appellate review of the MPSC's order is not a "civil action" within the meaning of § 1331. The Seventh Circuit in *International College of Surgeons v.*

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[5] Moreover, that Verizon requests declaratory relief is immaterial. *See Mackay v. Pfeil*, 827 F.2d 540, 545 (9th Cir. 1987) (holding that a request for declaratory relief that does not state a new case arising upon new facts, but in reality seeks review and correction of a state court judgment, is not within a federal court's original jurisdiction).

City of Chicago, 91 F.3d 981 (7th Cir. 1996), *rev'd on other grounds*, 522 U.S. 156 (1997) explained, in the context of a removal action, the test for determining whether an action seeking judicial review of a state administrative agency's decision is a civil action within a district court's original jurisdiction. If the state administrative review process provides for a trial *de novo*, the action does not require the district court to perform an appellate function that is inconsistent with the character of a court of original jurisdiction, and the state proceeding can be termed a "civil action." *Id.* at 990. If, however, the state administrative process requires the state court to proceed on the basis of a more deferential review of the state agency's findings and determinations, the action would require the district court to perform an appellate role with respect to the decision of the state administrative agency. In that case, "[t]he district court would not be performing a function that could be described as a 'civil action' within its original jurisdiction." *Id.* & n.10 (collecting cases). Thus, in analyzing whether an action is a "civil action" within the meaning of § 1331, the relevant inquiry is how the Maryland courts review the MPSC's decisions.

In reviewing the decisions of the MPSC, Maryland courts exercise a statutory jurisdiction. Md. Code Ann., Pub. Util. Co., § 3-203 (2001). Like the Illinois Administrative Review Act ("IARA") at issue in *International College of Surgeons*, § 3-203 of the Maryland Statute restricts the exercise of a reviewing court's power to those functions expressly delegated in the statute. This special statutory jurisdiction provides for a deferential review of the MPSC's findings and determinations. The appeal is to be heard on the record be-

fore the MPSC,[6] the MPSC's findings and conclusions on factual questions shall not be disturbed unless found to be unlawful or unreasonable by clear and satisfactory evidence, and the MPSC's decisions and orders shall be held to be *prima facie* correct. *Id.* § 3-203; *Office of Peoples Counsel v. Maryland Public Service Comm'n*, 733 A.2d 996, 1002-03 (Md. 1999). In short, the scope of review under § 3-203 is similar to that of the IARA in all respects that the Seventh Circuit in *International College of Surgeons* relied on in reaching its decision.[7]

Applying the test it articulated to the IARA, the Seventh Circuit in *International College of Surgeons* found that

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[6] Although a party may introduce new evidence on judicial review in the circuit court, that evidence, if materially different, is first referred to the MPSC for opportunity to modify its findings. § 3-208; § 3-206(b). If, on referral, the MPSC rescinds its order, the circuit court shall dismiss the appeal and any modification made by the Commission shall stand in place of the original action. *Id.* § 3-208(c)(1). If, on referral, the MPSC does not rescind or modify the original action, the circuit court shall render judgment on the original order. *Id.* § 3-208(c)(2).

[7] In Illinois, review of ICC decisions starts in the Illinois Appellate Court. In reviewing decisions of the ICC, Illinois appellate courts exercise a statutory jurisdiction, and not a general appellate jurisdiction. This special statutory jurisdiction is found in 220 ILCS § 5/10-201. Like the IARA, § 5/10-201 also restricts the exercise of a reviewing court's power to those functions expressly delegated in the statute. For example, the appeal shall be heard on the record before the ICC and no new or additional evidence may be introduced, the ICC's findings and conclusions on questions of fact shall be held prima facie to be true, and the ICC's decisions and orders shall be held to be *prima facie* reasonable. 220 ILCS § 5/10-201(d).

"[j]udicial scrutiny with this level of deference to the decision of the administrative agency certainly cannot be characterized as within the original jurisdiction of the court....It is an appellate proceeding and, as such, it is not a 'civil action'...of which the district courts...have original jurisdiction." *International College of Surgeons*, 91 F.3d at 992. As in *International College of Surgeons*, Verizon's action is an appellate proceeding and, thus, not a "civil action" within the meaning of § 1331. *See Trapp v Goetz,* 373 F.2d 380, 383 (10th Cir. 1966) ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C. § 1331 or § 1332.").

Petitioner Verizon implies that this Court rejected the Seventh Circuit's test for determining whether a suit is a "civil action" within a district court's original jurisdiction in its consideration of the *International College of Surgeons* case. *See* Verizon Br. at 36-37. In fact, the Court did not disturb the Seventh Circuit's test for determining whether a suit constitutes a "civil action" within a district court's original jurisdiction. Instead, it merely rejected the manner in which the Seventh Circuit applied the test to the particular circumstances before it. The Seventh Circuit held that even though the federal claims were removable, the entire suit was not a removable "civil action" because it contained state administrative claims for deferential on-the-record-review which were not "civil actions" of which the district court's have "original jurisdiction." *International College of Surgeons*, 91 F.3d at 993-94. The Seventh Circuit's error, this Court explained, was not in applying the test for a "civil action" to the federal claims, but rather in applying the test to the state administrative claims after it had already determined that the federal claims were civil actions within the

district court's original jurisdiction. *International College of Surgeons,* 522 U.S. at 166-67. The Court remarked:

> Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that ICS's federal claims were "civil actions" within the federal courts' "original jurisdiction."
>
> Having thus established federal jurisdiction, the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's supplemental jurisdiction, not its original jurisdiction.

Id. at 166-67. Supplemental jurisdiction lies over related "other claims" if and only if there already exists a "civil action of which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). That is, the exercise of supplemental jurisdiction presupposes a "civil action."

As distinguished from *International College of Surgeons*, in the instant case there is no federal claim independent of the administrative record that constitutes a "civil action" for purposes of § 1331. In other words, no independent federal claim predicate exists for supplemental jurisdiction to attach. Verizon's complaint contains two pendent claims in search of a federal question claim within the meaning of § 1331. In *International College of Surgeons*, ICS' constitutional claims were found to be "civil actions" because they were raised for the first time in the complaint in the circuit court and were not raised and decided at the Landmarks Commission. Since all of the claims in Verizon's complaint were raised, fully litigated, and decided at the MPSC its claims are bound by the administrative record. *International College of Surgeons*,

522 U.S. at 167. As a consequence, Verizon's action is one for appellate review of the MPSC's order and, therefore, is not a "civil action" within the meaning of § 1331.

In sum, because Verizon's action is one for appellate review of an MPSC order its appeal is not within the Court's "original jurisdiction" and is not a "civil action" as required by § 1331. Likewise, because Verizon's appeal arises under Maryland law, it does not "arise under" federal law for purposes of § 1331. If, as Verizon asserts, it finds fault with the MPSC's order, its proper course of action is to seek judicial review in Maryland courts. Verizon may not, as it does here, engage in an impermissible collateral attack of the MPSC's order in federal court. Accordingly, 28 U.S.C. § 1331 provides no basis for jurisdiction over Verizon's appeal.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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